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Supreme Court, U.S.
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No. 99-1113

In The
Supreme Court of the United States

IDIT DOBBS-WEINSTEIN,
Petitioner,

v.

VANDERBILT UNIVERSITY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

1. Whether the plaintiff suffered an adverse employment action sufficient to establish a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964 when she was denied tenure and as a direct result of that decision, her employment with the defendant subsequently ended?

2. Whether the decision by the Court of Appeals for the Sixth Circuit that the defendant's denial of tenure to the plaintiff constituted an "interim decision" conflicts with this Court's decisions in Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed.2d 431 (1980) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2269, 141 L. Ed.2d 633 (1998)?

3. Whether the decision of the Court of Appeals for the Sixth Circuit that the defendant's denial of tenure to the plaintiff in May 1994 did not constitute an "adverse employment action" conflicts with decisions by 1st, 3rd, 7th, 9th, 11th, and D.C. Circuits?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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PETITION FOR WRIT OF CERTIORARI

Petitioner Idit Dobbs-Weinstein respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit, filed on July 7, 1999, is reported as Dobbs-Weinstein v. Vanderbilt University, 185 F.3d 542 (6th Cir. 1999). (Appendix A). The trial court's decision, filed on January 21, 1998, is reported as Dobbs-Weinstein v. Vanderbilt University, 1 F. Supp.2d 783 (M.D. Tenn. 1998). (Appendix B). The trial court's unpublished judgment was filed January 21, 1998. (Appendix C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on July 7, 1999. The Court of Appeals denied a timely petition for rehearing on August 26, 1999. (Appendix D.)

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2 provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Tenn. Code Ann. § 4-21-401 provides:

> (a) It is a discriminatory practice for an employer to:
>
> (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin; . . .

STATEMENT OF THE CASE

Plaintiff Idit Dobbs-Weinstein ("Dobbs-Weinstein") brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., against her employer, defendant Vanderbilt University ("Vanderbilt"), and alleged that she was denied tenure in May 1994 because of her gender and national origin. The district court had subject matter jurisdiction over this action pursuant to 42 U.S.C. § 2000e et seq., 28 U.S.C. § 1331, and 28 U.S.C. § 1343, in that plaintiff timely filed her complaint after receiving a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission.

A. Tenure Review at Vanderbilt

The tenure review process at Vanderbilt occurs in the candidate's seventh year and begins with a review and recommendation by the tenured members of the candidate's department. (Apdx. E-2). The department's favorable recommendation is forwarded to the appropriate dean who either concurs or declines to concur.[1] (Id., E-3). If the dean

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[1]If the department fails to recommend tenure, then the dean may either accept the recommendation thus ending the matter or return the file to the faculty for reconsideration. If the faculty again declines to recommend tenure, then the dean may nevertheless make a positive recommendation to the Promotion and Tenure Review

declines to concur with a department's recommendation that tenure be granted, the department may vote by a two-thirds majority to appeal the dean's nonconcurrence to the Promotion and Tenure Review Committee ("PTRC"). (Id., E-3-E-4). Should the department's vote not garner a two-thirds majority, the tenure review process ends:

> A recommendation for tenure forwarded to a dean by a departmental or school faculty moves forward only with the concurrence of the dean, except when a department or school appeals a dean's nonconcurrence. A decision to appeal requires the affirmative vote of at least two-thirds of the department or school's tenured faculty, and is directed to the appropriate University Promotion and Tenure Review Committee.

(Id. (emphasis added)).

B. Dobbs-Weinstein's Tenure Review

In early 1994, the philosophy department at Vanderbilt recommended to Acting Dean John Venable ("Venable") that Dobbs-Weinstein be granted tenure. (Apdx A-2-A-3). In May 1994, Venable declined to concur with the department's decision. (Apdx A-3) In late August 1994, the department voted whether to appeal Venable's

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Committee. (Apdx E-2).

decision. As there were not two-thirds of the tenured faculty in favor of such an appeal, the tenure review of Dobbs-Weinstein ended. (Id.).

In a September 1994 memorandum to then Dean Madeleine J. Goodman, Venable stated:

> Traditionally, notification of termination has been provided to faculty members who face a mandatory tenure decision only after all hope has ended for a favorable outcome of the tenure process. When a departmental recommendation for tenure is turned down by the Dean, the process continues until (a) the department files a successful appeal, (b) the department appeals but the appeal is denied, or (c) the department decides not to appeal. Only by following one of these three mutually exclusive paths is the process concluded.

(Apdx. F-2, emphasis added). Thereafter, Dobbs-Weinstein was advised that her employment would terminate at the end of the 1994-1995 academic year. (Apdx. A-3).

C. Grievance Process

In October 1994, Dobbs-Weinstein filed a grievance with the Professional Ethics and Academic Freedom Committee of the Vanderbilt Faculty Senate ("PEAF" committee). (Apdx. A-3). According to the defendant,

> [the function of the PEAF committee is to hear questions of academic freedom, issues of discrimination, and procedural irregularities, not to decide whether tenure should, or should not, be awarded."

(Final Brief of the Appellee to the Court of Appeals, p. 10, n.9). Dobbs-Weinstein's grievance to the PEAF Committee occurred outside of and was not a continuation of the defendant's tenure process.

In light of the pendency of this grievance, Dobbs-Weinstein requested that then Dean Madeleine Goodman extend her faculty appointment for another year. Goodman refused. (Apdx. F-1).

In March 1995, the PEAF committee recommended that Dobbs-Weinstein's appointment be extended for another year because "the university's obligation to report such a decision by June 1 was breached and that the ensuing delay has damaged Dobbs-Weinstein by extending well into the next academic year the consideration of the grievance itself and our determination of its merits." (Apdx. G-25-G-28 (emphasis added)). The defendant rejected this recommendation of the PEAF Committee.

In March 1995, the PEAF committee also recommended that Dobbs-Weinstein's tenure file be forwarded to the PTRC for further review. (Apdx. A-3).

Months later and only after this lawsuit was filed did the Chancellor accept the PEAF's recommendation and

send the file to the PTRC. (Apdx. A-3, A-15). According to the Faculty Manual, the Chancellor may elect not to concur with a recommendation by the PEAF Committee. (Apdx. E-9). There is no further review of the grievance unless the grievance involves a termination for cause or "significant issues of conscience or academic freedom." (Id.).

On August 11, 1995, the PTRC concluded that Dobbs-Weinstein merited tenure. (Apdx. A-4). Notwithstanding this decision, Dobbs-Weinstein's salary and employment at Vanderbilt ended August 31, 1995.[2] She was notified of her COBRA rights. She was not assigned any teaching, committee or student advisory responsibilities in the fall semester of 1995. Her employee benefits were terminated.

The Provost subsequently agreed with the PTRC's conclusion that Dobbs-Weinstein merited tenure. (Apdx. A-4). Still, Dobbs-Weinstein remained unemployed. The Chancellor also agreed with the Provost and the PTRC that Dobbs-Weinstein merited tenure. (Id.) Again, Dobbs-Weinstein remained unemployed. Finally, in November 1995, the Board of Trust voted to offer Dobbs-Weinstein

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[2]Dobbs-Weinstein's job responsibilities ended at the end of the academic semester, June 1995; however, because Dobbs-Weinstein was paid on a twelve month salary plan, her final paycheck was issued at the end of August 1995.

tenure. Thereafter, Dobbs-Weinstein did receive backpay, and her benefits were reactivated. (Id.)

In May 1994, Dobbs-Weinstein was denied tenure. On June 30, 1995, her employment responsibilities with the defendant ended as a direct result of that May 1994 decision. On August 31, 1995, her income ceased as a direct result of that May 1994 decision. Dobbs-Weinstein remained unemployed for almost three months before the Board of Trust finally acted, some eighteen months after tenure was denied by Venable.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING IN DELAWARE STATE COLLEGE V. RICKS

According to the Court of Appeals, Dobbs-Weinstein failed to show that "she suffered an adverse employment action," and thus, her prima facie case failed. (Apdx. A-8). The majority reasoned that because "Dean Venable did not have the last word in Dobbs-Weinstein's quest for tenure," his decision was an "interim" one that did not constitute an adverse employment action sufficient to establish a prima facie case:

> Because tenure decisions are so complex and potentially contentious, universities are well-served to have a grievance procedure for individuals wishing to appeal any of the many intermediate decisions or evaluations made during the tenure review process. Vanderbilt employs such a process, which allowed Dobbs-Weinstein to prevent Dean Venable's interim decision from becoming final.

(Id. at 6-7). The lower court's characterization of Venable's decision is not supported by the record.

More importantly, the Court of Appeals' holding that Venable's decision was an "interim" one conflicts with this Court's holding in Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed.2d 431 (1980). In Ricks, this Court held that the statute of limitations begins to run when the plaintiff is denied tenure and so notified and that pendency of a grievance did not transform that denial of tenure into a "tentative" decision so as to toll the statute of limitations. Petitioner respectfully submits that if an action is sufficient to trigger the statute of limitations, then that action cannot be an "interim" decision. Simply put, the statute of limitations cannot run on a claim that does not yet exist.

In Ricks, the plaintiff was denied tenure in March 1974 and given a one-year terminal contract. Like Dobbs-

Weinstein, Ricks filed a grievance protesting that denial of tenure. However, Ricks' grievance was not sustained, and he was so notified in September 1974.

There is an important difference between the tenure review process of Vanderbilt and that of Delaware State College. Unlike Vanderbilt's review process, the tenure process of Delaware State College continued even if the candidate received a negative decision at a certain level of review; thus, all tenure decisions -- positive or negative -- were made by the Board of Trust.[3] In contrast, at Vanderbilt, the tenure review process does not proceed automatically to the next level of review. (Apdx. A-3; Apdx. E-3-E-4). Rather, the department's failure to appeal Venable's nonconcurrence ended Dobbs-Weinstein's tenure process. Therefore, petitioner submits that at least as of August 1994 (when the department failed to appeal the

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[3]In February 1973, the Faculty Committee on Promotions and Tenure recommended that Ricks not receive tenure, but agreed to reconsider its decision the following year. In February 1974, the Committee again recommended that Ricks not receive tenure. In March 1974, the Faculty Senate voted to support the Committee's negative recommendation. On March 13, 1974, the Board of Trust voted to deny Ricks tenure. Thus, the 1974 tenure review process took less than two months to complete. (Ricks, 449 U.S. at 252, 101 S. Ct. at 501-502).

dean's decision), Dobbs-Weinstein was in the same posture as Ricks was in March 1974.

Ricks waited until his one year terminal contract was completed in 1975 before filing a charge with the EEOC. The question before the Court was when the alleged unlawful employment practice occurred so as to trigger the statute of limitations. (Id. at 258-259, 101 S. Ct. at 504). This Court determined that "the limitations period commenced to run when the tenure decision was made and Ricks was notified." (Id.)

The Court's attention then turned to the issue of when that tenure decision was made — essentially the exact same question answered by the Court of Appeals in Dobbs-Weinstein's appeal.[4] The Court of Appeals' reasoning in Dobbs-Weinstein directly contradicts this Court's in Ricks.

In Ricks, the EEOC, in its amicus brief, argued that the Board of Trust's decision in March 1974 was not final and did not trigger the statute of limitations because the Board expressly advised Ricks that if his grievance was sustained, he still had a possibility of receiving tenure. (Id. at 260, 101 S. Ct. at 505). This Court rejected the EEOC's argument and stated:

> we think that the Board of Trustees had made clear well before September 12 that it

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[4]Notably, this issue was not raised by the defendant as a basis for its motion for summary judgment.

> had formally rejected Ricks' tenure bid. The June 26 letter itself characterized that as the Board's "official position." It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.

(Id. at 261, 101 S. Ct. at 505-506 (citations and footnotes omitted, emphasis added)).

Importantly, the Court also specifically rejected the argument that the pendency of a grievance tolls the running of the statute of limitations. Id. In other words, this Court found that Ricks' claim accrued, i.e., the adverse employment action occurred, in March 1974, and his grievance did not transform that decision to an "interim" one.[5]

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[5]A decision may be final enough to trigger the statute of limitations and still not be material enough or adverse enough to constitute a violation of Title VII. Further, it is conceivable that if a defendant promptly

When applied together, this Court's holding in Ricks and the Court of Appeals' decision in Dobbs-Weinstein produce a ludicrous and patently unfair result: the statute of limitations runs on a claim before it is a cognizable claim, or once it is a cognizable claim, it is barred by the statute of limitations. For example, had Dobbs-Weinstein waited to the end of her grievance process (and it had been decided adverse to her), her claim would be barred under the rationale of Ricks; conversely, because she filed her lawsuit within the statute of limitations and even though she suffered the very real economic effects of Venable's decision (see infra, II.), she did not, under the Court of Appeals' reasoning, suffer an adverse employment action.

Granted, this untenable result is reached only if Venable's decision was the unlawful employment practice that triggered the limitations period. However, when the test applied by this Court in Ricks is applied to the tenure process of Dobbs-Weinstein, it is clear that Venable's decision was the factual predicate for the "unlawful employment practice" and triggered the statute of limitations.

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corrects a materially adverse employment decision, the plaintiff may suffer no damages. However, the Court of Appeals decision does not rest on any these predicates.

In determining that the Board's March 1974 decision in Ricks was the tenure decision for purposes of triggering the statute of limitations, the Court focused on the manner in which the defendant college characterized its own decision and the fact that a collateral review of an employment decision does not toll the limitations period.[6] (Id.) Delaware State College advised Ricks that the denial of tenure was its "official" decision, but also acknowledged the pendency of the grievance and the possibility that the tenure decision could be "superceded." (Id. at 254, n.2, 101 S. Ct. 502, n.2).

Unlike Delaware State College, Vanderbilt never indicated by word or deed that Venable's decision was ever subject to reversal or supersession until the Board of Trust met and voted in November 1995. Venable's "interim" decision remained in effect -- for eighteen months -- despite the subsequent positive recommendations by the PTRC, the Provost, and the Chancellor. Moreover, the grievance process employed by Dobbs-Weinstein occurred outside the tenure process itself and is not provided for in the tenure

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[6]The Court relied heavily on the June 1974 letter (reprinting it in its entirety in note 2 to the Court's opinion) in which the defendant acknowledged the pendency of the grievance and indicated that it might take action to supercede its previous action depending on the outcome of the grievance. (Ricks, 449 U.S. 252, n. 2, 101 S. Ct. at 501, n.2).

provisions of the Faculty Manual. *(Apdx. E-1-E-4).* The Faculty Manual also recognizes that the PEAFgrievance process does not toll the statute of limitations:

> It is understood that there are legal requirements relating to the time limitations when one may file a charge of discrimination with federal or state human rights agencies. Should this deadline arrive prior to the completion of the grievance process, and should the grievant elect to file a charge with a governmental agency, this will not prejudice the grievance process.

(Apdx. E-10-E-11). Dobbs-Weinstein's "appeal" of Venable's decision occurred outside of the defendant's tenure review process. Notably, even when the Chancellor returned the issue of Dobbs-Weinstein's tenure to the tenure review process, i.e., with the referral of the matter to the PTRC, Venable's decision remained in effect despite the contrary conclusions reached by the PTRC, the Provost, and the Chancellor. Therefore, the grievance constituted a collateral review of the tenure decision by Venable.[7]

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[7]As noted by Judge Moore, who dissented from the Court of Appeals' decision, "the filing of this lawsuit may have been a factor in bringing closure to a lengthy internal review process. In such a situation, the litigation is necessary and should not be discouraged." (Apdx. A-15). In April 1995, the PEAF committee recommended that

Thus under this Court's reasoning in Ricks, Venable's decision to deny Dobbs-Weinstein tenure triggered her statute of limitations and constituted an adverse employment action for purposes of establishing her prima facie case. That the defendant may partially remedy the effect of an employment action some eighteen months later does not and should not alter or determine the nature of the employment action especially when its effects have been felt by the plaintiff. A defendant's efforts to remedy a prior employment action are relevant to the issue of damages but do not alter the character of the prior employment action.

The lower court's holding effectively eliminates all certainty as to when the statute of limitations commences as to an employment action that could conceivably be reviewed in any way. According to the defendant employer, the tenure review process ended when the

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Dobbs-Weinstein's tenure file be reviewed by the PTRC. The PEAF's recommendation sat on the Chancellor's desk for over two months. Finally, when classes were ending in late May 1995 and because the Chancellor had taken no action on the PEAF committee's recommendation, the plaintiff filed suit in the district court. Some three weeks later and over a year after she was denied tenure by Venable, the Chancellor finally acted on the recommendation of the PEAF and sent Dobbs-Weinstein's tenure file to the PTRC.

department failed to vote to appeal the dean's decision, (Apdx. E-3), but according to the Court of Appeals, the process had not concluded. Just which characterization applies to determine when a potential litigant's claim accrues? Cannot an employee rely on the employer's own characterization of its procedures?

Dobbs-Weinstein did not have a crystal ball to see into the future when she filed this action in May 1995. In fact, she waited as long as she could. Her job was about to end as her terminal contract of employment was complete at the end of the 1994-1995 academic year. At that point, Venable's tenure decision had stood unaltered for over a year. Her grievance had been successful in that the PEAF committee had recommended further review of her tenure file, yet its recommendation and her tenure file sat on the Chancellor's desk, and no action had been taken. Just how long is a plaintiff supposed to wait for a defendant to reconsider and correct an erroneous employment decision? Until the statute of limitations runs?

The Court of Appeals' opinion makes no mention of Ricks and does not attempt to reconcile the two holdings in any way. The Court of Appeals has left the legal landscape blurry and uncertain. The decision also leaves victims of discrimination to grapple with the very real and often devastating economic, emotional, and professional consequences of such "interim" decisions.

Dobbs-Weinstein's petition should be granted so that the Court may again affirm the importance and rationale of its decision in Ricks.[8]

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING ON WHAT CONSTITUTES A "TANGIBLE EMPLOYMENT ACTION"

Dobbs-Weinstein's employment with the defendant ended as a direct result of Venable's decision that she did not merit tenure. Notwithstanding that fact, the Court of Appeals concluded that Dobbs-Weinstein's termination of employment did not constitute an adverse employment action. This holding directly conflicts with this Court's decision in Burlington Industries v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed.2d 633 (1998).

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[8]Petitioner submits that should this Court determine that a grant of the petition is not warranted, this matter should be remanded to the lower court to reconsider its decision in light of this Court's holding in Ricks.

In Ellerth, the Court discussed what constitutes a "tangible employment action":[9]

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Compare Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation"), with Flaherty v. Gas Research Institute, 31 F.3d 451, 456 (7th Cir. 1994) (a "bruised ego" is not enough); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 887 (6th Cir. 1996) (demotion without

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[9]Plaintiff submits that "tangible employment action" is a "material and adverse employment action" for purposes of a prima facie case in light of the decisions cited in the Court's discussion.

> change in pay, benefits, duties, or prestige insufficient) and Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more inconvenient job insufficient).

(Ellerth, 118 S. Ct. at 2268-2269 (emphasis added)). A tangible employment action in most cases inflicts direct economic harm. (Id.)

The terms and conditions of Dobbs-Weinstein's employment at Vanderbilt significantly, materially, and adversely changed because of Venable's decision to deny her tenure. Specifically, her job responsibilities ended on June 30, 1995. Venable's decision inflicted direct economic harm, i.e., her salary ended on August 31, 1995. Her benefits ended, and Dobbs-Weinstein was notified of her COBRA rights. The tuition benefit that her daughter was utilizing to go to college also ended. Dobbs-Weinstein was assigned no teaching, student advisory, or committee responsibilities in the Fall Semester 1995.

All of these adverse changes occurred even though the PTRC had already determined in August 1995 that she merited tenure. These changes occurred because Dobbs-Weinstein was no longer employed by Vanderbilt University. These are "significant changes in employment status," which were also material and adverse to the plaintiff.

As a result of Venable's decision, Dobbs-Weinstein also spent much of 1995 looking for alternative employment and thereby attempting to mitigate her damages. Her failure to be awarded tenure at Vanderbilt University necessarily became known within the academic community. The plaintiff suffered emotionally and professionally from Venable's decision to deny her tenure. Notwithstanding the fact that the Board of Trust eventually offered Dobbs-Weinstein tenure, the plaintiff's professional reputation and her future employability were adversely affected by the denial of tenure by Venable. (Apdx. H).

The Court of Appeals erroneously concluded that the grievance and the Board of Trust's eventual offer of tenure to Dobbs-Weinstein somehow transformed Venable's denial of tenure to an "interim determination."[10] However, the petitioner's grievance had no mitigating effect on Venable's decision or its attendant consequences. The favorable result of that grievance process, i.e., the recommendation of the PEAF committee that Dobbs-Weinstein's file be further reviewed had no mitigating effect on Venable's decision or its attendant consequences.

If, as the Court of Appeals held, Venable's was an "interim" decision, then the subsequent decisions of the

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[10]An argument specifically rejected by this Court in Ricks, see supra at I.

PTRC, the Provost, and the Chancellor should have obviated Venable's decision. This did not happen.

On August 11, 1995, the PTRC decided that Dobbs-Weinstein merited tenure. The PTRC's decision had no mitigating effect on Venable's decision. In fact, the plaintiff's employment ended after the PTRC recommended she receive tenure, and the defendant did nothing to prevent this economic harm. The plaintiff had no job from June 30, 1995 and no income from September 1, 1995, until November 3, 1995, despite three recommendations subsequent to Venable's decision that Dobbs-Weinstein receive tenure.

When the Board of Trust met in November 1995, the plaintiff had no job, no salary, no benefits, no tenure, and no recognized connection to Vanderbilt University. In sum, the defendant treated Venable's decision to deny Dobbs-Weinstein tenure as a final decision. More importantly, the terms and conditions of Dobbs-Weinstein's employment were materially and adversely affected by Venable's decision.

Clearly, Dobbs-Weinstein suffered a "significant change in employment status" as a direct result of Venable's decision to deny her tenure. (Ellerth, 118 S. Ct. at 2268-2269). Venable's decision inflicted "direct economic harm." (Id.). Dobbs-Weinstein's professional reputation was harmed, and she suffered significant emotional distress over the eighteen month period. (Apdx.

H). The Court of Appeals' decision is contrary to this Court's holding in Ellerth.

Dobbs-Weinstein's petition should be granted so that the Court may affirm the importance of its holding in Ellerth.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRIOR RULINGS FROM THE COURTS OF APPEALS FOR THE FIRST, THIRD, SEVENTH, NINTH, ELEVENTH AND D.C. CIRCUITS.

There is a considerable diversity of opinion amongst the federal courts as to what constitutes an "adverse employment action". (Settle v. Baltimore County, et al., 34 F. Supp.2d 969, 988-989 (D. Md. 1999); Nelson v. University of Maine System, 923 F. Supp. 275, 281 (D. Me. 1996) ("Divergent authority, nationwide, obscures the parameters of adverse employment action.")).

The Court of Appeals cited one federal appellate court decision in support of its holding. (Apdx. A-8), and the decision of the Fourth Circuit in Page v. Bolger is easily distinguishable. The decision at issue there was not an "employment" decision, but rather a decision about who could serve on the committee that made the employment decision. (Page v. Bolger, 645 F.2d 227, 233 (4th Cir.

1981)). In Page, the plaintiff was twice denied a promotion by a committee whose composition violated the Postal Service's affirmative action regulations. (Id. at 232). Page argued unsuccessfully that the adverse employment action was the composition of committee. (Id.) However, the court in Page held that Title VII does not reach such interim decisions, but only addresses "ultimate employment actions" such as "hiring, granting leave, discharging, promoting, and compensating." (Id. at 233). As stated, plaintiff was terminated and her employee benefits ended as a result of Venable's decision. These constitute "ultimate" employment actions as that phrase is used in Page. The court in Page was also careful to state that:

> we suggest no general test for defining those "ultimate employment decisions" which alone should be held directly covered by s717 and comparable antidiscrimination provisions of Title VII. Among the myriad of decisions constantly being taken at all levels and with all degrees of significance in the general employment contexts covered by Title VII there are certainly others than those we have so far specifically identified that may be so considered . . . .

(Page 645 F.2d at 233). Furthermore, many of the Courts of Appeal have disagreed that the scope of Title VII is as narrow as the Fourth Circuit would have it. (See Silk v.

City of Chicago, _ F.3d __, 1999 WL 804008 at *7 (7th Cir. 1999)(the defendant's refusal to allow plaintiff to pursue secondary employment and the five-day suspension are adverse employment actions.); Biolchini v. General Electric Co., 167 F.3d 1151, 1154 (7th Cir. 1999)(one week suspension is an adverse employment action); Wideman v. Wal-Mart Stores Inc., 141 F.3d 1453, 1456- 57 (11th Cir.1998)(test in Page is limited to federal employees)); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir.1994)(adverse actions covered by §2000e-3(a) include "demotions . . . [and] refusals to promote. . . ."); Nelson v. Upsala College, 51 F.3d 383, 387 (3rd Cir.1995)(an adverse employment action must at least impair or potentially impair the plaintiff's employment); Yartzoff v. Thomas, 809 F.2d 1371, 1375- 1376 (9th Cir .1987)(transfer of job duties and a negative performance rating are "adverse employment decisions."); Massarsky v. General Motors Corp., 706 F.2d 111, 122 (3rd Cir. 1983)(lay off is an adverse employment action); Trout v. Lehman, 702 F.2d 1094 (D.C.Cir.1983), vacated on other grounds, 465 U.S. 1056)(lateral transfer to an undesirable location constitutes an adverse employment action); Kleckley v. Milwaukee Public Schools, 20 F. Supp.2d 1264 (E.D. Wis. 1998)(suspension without pay is an "adverse employment action.")).

Depending on where an individual lives, a suspension without pay for a week is an adverse

employment action that enjoys the protection of Title VII, but in the Sixth Circuit, the denial of tenure and the consequential termination of employment does not. Tenure is the most important career milestone for an individual in academia. Denial of tenure is professionally and emotionally devastating. Dobbs-Weinstein lived with this reality and dealt with its consequences for eighteen months because of Venable's discriminatory decision. Dobbs-Weinstein suffered an adverse employment action.

Allowed to stand, the lower court's holding places almost every conceivable employment action beyond the purview of Title VII. All an employer need do, to avoid Title VII, is label its decision "interim." Apparently, its not enough to be terminated, lose one's income, suffer emotional distress and serious damage to one's professional reputation -- not if after eighteen months and the filing of a Title VII civil action, the employer decides to offer re-employment. Under the reasoning of the Court of Appeals, an employer can wield the most effective means at its disposal, i.e., termination, to wreak economic havoc on an employee so long as at some distant point in the future, there's a chance that the employer's decision might possibly be superceded. This is not what the Civil Rights Act of 1964 is about.

CONCLUSION

In sum, the Court of Appeals' decision is squarely at odds with the prior rulings of this Court. If allowed to stand, the decision injects considerable uncertainty into what was previously a relatively settled area of the law, i.e., when does the statute of limitations begin to run in a Title VII claim. The Court of Appeals' decision also places any employment decision that might some day be changed beyond the protection of Title VII, and this holding is decidedly contrary to the prior holding of this Court in Ellerth and a majority of the Courts of Appeals .

The lower court's opinion also places an unjustified burden on individuals who are victims of discriminatory employment actions. The plaintiff suffered material and adverse effects of Venable's denial of her tenure. Under the rationale of the Sixth Circuit, Dobbs-Weinstein has no recourse for her injury — even if, as alleged, Venable acted with discriminatory animus.

Finally, eighteen months is just too long. If the defendant had been prompt, Dobbs-Weinstein would not have been unemployed for three months. Plaintiff Dobbs-Weinstein suffered a significant change in employment status and a material and adverse employment action.

This petition for writ of certiorari should be granted in order to resolve these conflicts.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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File Name: 99a0243p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IDIT DOBBS-WEINSTEIN,
Plaintiff-Appellant
Cross-Appellee,

v.

Nos. 98-5266/
5268

VANDERBILT UNIVERSITY,
Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 95-00560 — John T. Nixon, District Judge.

Argued: April 22, 1999

Decided and Filed: July 7, 1999

Before: KENNEDY, SILER, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Richard J. Braun, RICHARD J. BRAUN & ASSOCIATES, Nashville, Tennessee, for Appellant. William N. Ozier, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellee. ON BRIEF: Richard J. Braun, RICHARD J. BRAUN & ASSOCIATES, Nashville, Tennessee, for Appellant. William N. Ozier, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellee.

OPINION

SILER, J., delivered the opinion of the court, in which KENNEDY, J., joined. MOORE, J. (pp. 9-12), delivered a separate dissenting opinion.

SILER, Circuit Judge. Plaintiff Idit-Weinstein appeals the district court's grant of summary judgment in favor of defendant Vanderbilt University on her Title VII claim for gender and national-origin discrimination. Vanderbilt cross-appeals the dismissal without prejudice of Dobbs-Weinstein's pendent state law claims under the Tennessee Human Rights Act and for breach of contract. We AFFIRM.

I. BACKGROUND

In January 1994 the philosophy department at Vanderbilt recommended that Dobbs-Weinstein be granted

tenure by a vote of five to four of the tenured faculty after a thorough review of her scholarship, teaching, and service. That recommendation was then forwarded to the acting dean of the College of Arts and Sciences, John Venable, who in May 1994 declined to concur in the department's recommendation of tenure due to concerns with the quality of Dobbs-Weinstein's research and teaching. Thus, Dobbs-Weinstein was advised that her appointment would expire at the end of the 1994-95 academic year, on August 31, 1995. The philosophy department was unable to appeal Dean Venable's decision to Vanderbilt's Promotion and Tenure Review Committee ("PTRC") because it could not obtain the requisite two-thirds vote in its August 1994 vote on the appeal.

In October 1994 Dobbs-Weinstein filed a grievance with Vanderbilt's Senate Committee on Professional Ethics and Academic Freedom (the "PEAF Committee"). She cited a number of procedural irregularities and charged that gender and national-origin bias played a role in Dean Venable's decision. The PEAF Committee issued a report in April 1995 criticizing the reasoning in Venable's report, which detailed his rationale for declining to concur in the philosophy department's narrow recommendation for tenure. Concluding that Vanderbilt had not properly followed procedure in Dobbs-Weinstein's tenure review process, the PEAF Committee recommended that her file be forwarded to the PTRC. Dobbs-Weinstein filed the instant action in May 1995 before the PTRC acted.

After review, the PTRC recommended in August 1995 that Dobbs-Weinstein receive promotion and tenure, although it acknowledged that Dean Venable's prior contrary decision was based on "legitimate, reasonable and weighty" concerns. Its recommendation was accepted and implemented by Vanderbilt after the concurrences of Provost Burish and Chancellor Wyatt. In November 1995 the Board of Trustees promoted her to Associate Professor with tenure, retroactive to the end of the 1993-94 academic year, when Dobbs-Weinstein would have received tenure but for Dean Venable's decision not to concur in the philosophy department's recommendation. She received back pay for the 1994-95 academic year to compensate for the delayed promotion and was given full pay for the period after August 31, 1995, when payment for her previous contract had ended.

Dobbs-Weinstein asserts that Dean Venable's decision not to concur in the philosophy department's recommendation of tenure was discriminatory. She contends that the ultimate grant of tenure, promotion, and back pay, accomplished after a grievance process, has not compensated her for the interim emotional distress and the potential damage to her reputation that she suffered as a result of Dean Venable's decision. She also requests interest on the back pay she received. The district court granted summary judgment in favor of Vanderbilt. Although the district court found that the case was not moot and that Dobbs-Weinstein had presented a prima facie case of employment discrimination, the court determined that she had not shown pretext by Vanderbilt.

II. DISCUSSION

This court reviews a grant of summary judgment de novo. *See City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). Summary judgment is to be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment is only to be granted if a reasonable jury could return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248.

The plaintiff bears the burden of establishing a prima facie case of employment discrimination. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972)). To establish a prima facie case of discrimination, Dobbs-Weinstein must show, at a minimum, that: (1) she was a member of a protected class; (2) she was qualified for the position; and (3) she suffered an adverse employment action. See id. at 582-83.[1] As a woman and a citizen of Israel and

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[1]This court has not yet addressed the required elements of a prima facie case in a tenure denial situation. Here the district court used only the three factors listed above, citing an earlier Middle District of Tennessee case which utilized a similar approach and was affirmed by this court without comment on the prima facie elements. *See Langland v. Vanderbilt Univ.*, 589 F. Supp. 995, 1003 (M.D. Tenn. 1984), *aff'd*, 772 F.2d 907, 1985 WL 13611 (6th Cir. Aug. 19, 1985)(unpublished and per curiam). The district court reasoned that because Vanderbilt was capable of hiring another tenured professor in the philosophy department, it was unnecessary for Dobbs-Weinstein to establish that the position remained open or was filled by an applicant who was not a member of the

Canada, Dobbs-Weinstein can establish that she is a member of a protected class. We may also presume that she is qualified to be an Associate Professor with tenure in Vanderbilt's philosophy department in light of the fact that she now holds that position. What remains to be established is whether she has suffered an adverse employment action cognizable under Title VII.[2]

Dobbs-Weinstein argues that the adverse employment action giving rise to her Title VII complaint is Dean Venable's decision not to concur in the philosophy department's recommendation that she receive promotion and tenure. As a result of that decision, Venable notified her that she would not receive tenure and that she would only be employed by Vanderbilt for one more year. Dean Venable did not have the

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protected class. *See Dobbs-Weinstein v. Vanderbilt Univ.*, 1 F. Supp.2d 783, 791, n.12 (M.D. Tenn. 1998). Other circuits have employed varying standards. *See, e.g., Namenwirth v. Board of Regents*, 769 F.2d 1235, 1240 (7th Circ. 1985)(requiring the plaintiff to show as a fourth element of the prima facie case that "an applicant not in the protected was granted tenure"); *Tanik v. Southern Methodist Univ.*, 116 F.3d 775, 776 (5th Cir.)(as final element of a prima facie case, plaintiff must show that "he was denied tenure in circumstances permitting an inference of discrimination"), *cert. denied*, --- U.S. ---, 118 S.Ct. 600 (1997). Because we affirm this case for a failure to establish one of the above three elements of a prima facie case, we decline to reach the question of whether a fourth element is required in a case involving the denial of tenure.

Because this court reviews a grant of summary judgment de novo, we may affirm the judgment of the district court on any grounds supported by the record, even if they are different from those relied upon by the district court. *See Management Corp.*, 43 F.3d at 251.

last word in Dobbs-Weinstein's quest for tenure, however, as evidenced by the fact that she was able to utilize Vanderbilt's internal grievance process and is now an Associate Professor with tenure. The Board of Trustees made the final decision for Vanderbilt on Dobbs-Weinstein's position at the university.

We acknowledge that "tenure decisions" in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-9 (2d Cir. 1984) (providing reasons why tenure decisions are often difficult to place in a traditional employment framework: the lifetime nature of the contract, the fact that the decisions are often non-competitive, the decentralized nature of the decision-making process, the multiplicity of factors in the decision, the fact that tenure decisions are often quite contentious, and the reluctancy of courts to review the merits of a tenure decision). Because tenure decisions are so complex and potentially contentious, universities are well-served to have a grievance procedure for individuals wishing to appeal any of the many intermediate decisions or evaluations made during the tenure review process. Vanderbilt employs such a process, which allowed Dobbs-Weinstein to prevent Dean Venable's interim decision from becoming final. She does not contend that her position at Vanderbilt has been lessened as a result of her resort to the grievance process or that she is in any way unequal to other Associate Professors with tenure at the

university.[3] Venable's decision does not constitute the "adverse employment action" required to establish a prima facie case.

In so holding, we note that we are not alone in focusing on whether Dobbs-Weinstein can present a case based on an "ultimate employment decision." *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)("Disparate treatment theory as it has emerged in application of [§ 717, which covers federal employees] and comparable provisions of Title VII . . . has consistently focused on the question whether there has been discrimination in which could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating . . . . [I]t is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII."). At least three district courts have drawn similar conclusions in employment discrimination cases based on delayed grants of tenure. *See Howze v. Virginia Polytechnic and State Univ.*, 901 F. Supp. 1091, 1096-97 (W.D. Va. 1995); *Negussey v. Syracuse Univ.*, 1997 WL 141679 at *8-*12 (N.D.N.Y. March 24, 1997); *Davis v. City Univ. of New*

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[3]She does, however, claim injury to her future employability at other institutions of higher learning, but the basis for this speculative element of damages is unclear, as the affidavits on which she relies were not provided to this court in the joint appendix.

York, 1996 WL 243256 at *8-*9 (S.D.N.Y. May 9, 1996). *Howze* held that the plaintiff had failed to establish a prima facie case of retaliation on the basis of the tenure process for lack of an "adverse employment action" when the final layer of plaintiff's tenure review process reversed earlier recommendations against her tenure. *Howze*, 901 F. Supp. at 1096-97 ("To hold otherwise opens the door to endless litigation of intermediate steps in an employment decision-making process that have no effect on the ultimate outcome. . . . [W]here the tenure decision was following the chain of appeal, each decision along the way is not actionable. Only the final decision is the ultimate act.").

Dobbs-Weinstein has not created a claim for employment discrimination by suing Vanderbilt before the final decision on her promotion and tenure was made. She argues that her claims for emotional distress and professional reputation damages mean that her claim is viable, but that argument places the cart before the horse. A claim for potentially recoverable damages does not transform Venable's decision into an "adverse employment action." Dobbs-Weinstein succeeded in the grievance process, and Vanderbilt's final decision was to grant her tenure. She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII. To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.

Vanderbilt argues in its cross-appeal that the district court erred in dismissing Dobbs-Weinstein's state law claims without prejudice because it claims that judicial economy considerations weigh in favor of dismissal with prejudice. Under 28 U.S.C. § 1367(c)(3), the district court has the discretion to dismiss claims over which it has supplemental jurisdiction when it has dismissed all claims over which it has original jurisdiction. This court reviews the dismissal of pendent state law claims for abuse of discretion. *See Taylor v. First American Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992). The district court did not abuse its discretion in dismissing Dobbs-Weinstein's state law claims without prejudice after it had dismissed her federal claims without a trial.

AFFIRMED.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The majority holds that, even if Dean Venable discriminated against Professor Dobbs-Weinstein in declining to concur in the philosophy department's tenure recommendation, Dobbs-Weinstein did not suffer an adverse employment action and may not recover under Title VII. This is so, the majority concludes, because Dobbs-Weinstein ultimately received tenure and back pay after resorting to the

University grievance process and filing suit. I disagree and respectfully dissent. I do not think that, as a matter of law, we can reject the assertion of an adverse employment action in this instance.

In January 1994 the Vanderbilt philosophy department voted to recommend that Dobbs-Weinstein be promoted to the tenured position of Associate Professor as of the conclusion of the 1993-94 academic year. In May 1994 Dean Venable declined to concur in this recommendation, and subsequently Dobbs-Weinstein was informed that her contract with the University would conclude on August 31, 1995. Although Vanderbilt ultimately granted Dobbs-Weinstein tenure and promotion, this did not occur until November 1995, well over a year after tenure otherwise would have been granted and several months after Dobbs-Weinstein's contract terminated. As a result of the untimeliness of Vanderbilt's internal review process (over a year passed between Dobbs-Weinstein's filing of her grievance) and the speed with which the expiration of her contract approached, Dobbs-Weinstein was forced to seek employment outside of the University, and the disclosure of Vanderbilt's initial decision to deny tenure inevitably became known within the academic community. Dobbs-Weinstein has offered evidence indicating that her academic reputation and prospects were damaged thereby. Thus, in addition to seeking interest on the back pay provided by the University, Dobbs-Wesintein seeks to recover for the reputational damage and the emotional harm suffered as a result of Dean Venable's alleged discriminatory action.

Dobbs-Weinstein has alleged compensable injuries under Title VII. "The goal of Title VII is to 'make persons whole for injuries suffered on account of unlawful employment discrimination.'" *Suggs v. Servicemaster Educ. Food Management*, 72 F.3d 1223, 1233 (6th Cir. 1996)(quoting *Albermarle Paper co. v. Moody*, 422 U.S. 405, 418 (1975)). This court has recognized that in making a plaintiff whole it often will be appropriate to award prejudgment interest, see *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1170 (6th Cir. 1996), *amended*, 97 F.3d 833 (6th Cir. 1996), and damages for emotional harm. See, e.g., *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996). Similarly, a successful Title VII plaintiff should be compensated for reputational damage especially when it impacts on her employment or her future employability and advancement.

Despite the prospect of compensable damages, however, the majority concludes that Dobbs-Weinstein did not suffer an adverse employment action that could entitle her to relief under Title VII. The existence of an adverse employment action clearly is an element of a prima facie case under Title VII, but this court has not before addressed the scope of this requirement in similar circumstances. In *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996), however, we held that a Title VII plaintiff must demonstrate a materially adverse change in the terms or conditions of employment to make out a prima facie case. In *Kocsis* we determined that the reassignment of an employee

which entailed no decrease in pay or benefits and no material change in duties did not constitute a materially adverse employment action. *See id.* at 886-87. Dobbs-Weinstein, by contrast, was denied tenure and was informed that her employment at Vanderbilt would end at the end of the academic year. Although this decision ultimately was reversed, the termination of Dobbs-Weinstein's employment was not stayed pending the outcome of a lengthy review process. In this circumstance, I would hold that Dobbs-Weinstein suffered a materially adverse change in the terms or conditions of her employment.

The majority cites a number of cases from outside the circuit to bolster its contention that Dobbs-Weinstein did not suffer an adverse employment action. However, I find all of these cases to be distinguishable and some to be supportive of Dobbs-Weinstein's position. In *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.)(en banc), *cert. denied*, 454 U.S. 892 (1981), the court reasoned that only "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating" are covered by Title VII. The selection of a review committee that would make hiring or promotion decisions, the court concluded, was only an "interlocutory or mediate decision[]" that does not implicate Title VII. *See id.* In a situation in which an employee has been given notice of termination and the clock is running, however, I would think that the existence of a grievance procedure automatically transforms the tenure denial into an interlocutory decision for the purposes of Title VII.

In *Howze v. Virginia Polytechnic & State University*, 901 F. Supp. 1091, 1096 (W.D. Va. 1995), a tenure candidate initially was denied tenure but on internal university review "was ultimately awarded her promotion and tenure and given pay and rank increases *at the same time as other promotees*." (Emphasis added.) Thus, it could be fairly said that the decision complained of had "no effect on the ultimate outcome" and that the *Howze* plaintiff, unlike Dobbs-Weinstein, did not suffer an adverse employment action. *See id.*

In *Davis v. City University of New York*, No. 94 CIV 7277 (SHS), 1996 WL 243256, at *8 (S.D.N.Y. May 9, 1996), the plaintiff alleged that the defendants had delayed and attempted to block her award of tenure and promotion. The court held that there was no material adverse employment action, but the opinion does not indicate whether the delay was serious, and the only adverse effect claimed by the plaintiff was anxiety. *See id.* *9.

Finally, in *Negussey v. Syracuse University*, No. 95-CV-1827, 1997 WL 141679, at *6-12 (N.D.N.Y. 1997), the court held that a nine-month delay in a grant of tenure did not constitute an adverse employment action. In its analysis, however, the *Negussey* court focused on whether the plaintiff had suffered any injuries in the course of the appeal process and concluded that he had not. *See id.* at *10-12. The court noted, however, that injury to professional reputation could constitute an adverse employment action for a university professor. *See id.* at *11. Dobbs-Weinstein, by contrast, has

raised credible allegations of damage to professional reputation. Morever, the eighteen-month interval between the initial denial of tenure and the ultimate award in Dobbs-Weinstein's case seems excessive. *See id.* at *12 (remedial action that is insufficiently prompt can constitute an independent, actionable harm under Title VII).

Unlike the majority, I am not concerned that permitting Dobbs-Weinstein to go forward with her action will encourage premature litigation concerning adverse initial employment decisions. As long as an employer's appeal or grievance process operates in a timely fashion, the employee generally will not suffer a materially adverse action. This is particularly true if the employer refrains from terminating the employee in the interim, but, even if the employee is wrongfully terminated, voluntary reinstatement provision of back pay will limit or possibly even obviate the recovery of compensatory damages. Moreover, the filing of this lawsuit may have been a factor in bringing closure to a lengthy internal review process. In such a situation, the litigation is necessary and should not be discouraged.

For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

IDIT DOBBS-WEINSTEIN	)	
	)	
	)	
V.	)	
	)	**No. 3:95-0560**
VANDERBILT UNIVERSITY	)	**Judge Nixon**
	)	

MEMORANDUM

Pending before the Court in the above-styled matter is Defendant Vanderbilt University's Motion for Summary Judgment (Doc. No. 35), to which Plaintiff idit Dobbs-Weinstein filed a Response (Doc. No. 43). For the reasons outlined below, the Court grants the Motion and dismisses Plaintiff's state law claims.

I. Background

Plaintiff Dobbs-Weinstein alleges discrimination in employment on the basis of her gender and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Tennessee Human Rights Act, Tenn. code Ann. § 4-21-101 et seq.. Plaintiff also brings state claims for breach of contract and

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 1-21-98 .

breach of covenant of good faith.[1] Plaintiff is an Israeli national, and also holds Canadian citizenship. In the Fall of 1987, she was appointed to the position of Assistant Professor of Philosophy, a tenure-track position.[2] Plaintiff's claims arise out of Vanderbilt University's decision to deny her tenure in the Spring of 1994.

After joining the faculty in 1987, Plaintiff's performance and her potential to qualify for tenure were reviewed at various intervals, in accordance with the Rules and Procedures for Appointments, Renewals, Promotions and Tenure in the College of Arts and Science ("College Rules," Mem. Supp. Mot. Summ. J., App. B). In order to be reappointed at each interval, the College Rules Require approval by a majority of the tenured members of Plaintiff's department, in this case the Philosophy Department. At the end of her second year, in the spring of 1989, Plaintiff was

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[1] Plaintiff's Complaint also alleged a libel claim, but that claim has since been dropped.

[2] Vanderbilt University is divided into several colleges and schools, including the College of Arts and Science ("the College"). Within the College are various departments, amount them the Philosophy Department. The top academic officer of the College is the Dean, while the University's chief academic officer is the Provost. The Provost ultimately reports to the Chancellor.

reviewed and she was reappointed for an additional two years. At the end of Plaintiff's fourth year, in the spring of 1991, Plaintiff was again considered for reappointment, and again was approved, this time for a three-year extension. At the end of that three-year term, in the spring of 1994 -- Plaintiff's seventh year of appointment -- the Department considered whether to grant Plaintiff the tenured position of Associate professor.

The University's Faculty Manual ("Manual," Mem. Supp. Mot. Summ. J., App. A) outlines the criteria by which each renewal and reappointment decision are to be made. The Manual provides for three general areas of excellence which must be fulfilled:

> For the award of tenure, Vanderbilt requires (1) excellence in research, scholarship, or creative expression in one's discipline to discipline, the form taken by a candidate's contribution will vary. But, in each case, Vanderbilt expects the level and quality of achievement in research, scholarship, or creative expression and teaching equivalent to that required for tenure in leading departments or schools of other major research universities. In addition, Vanderbilt expects satisfactory performance in the area of (3) service.

(Manual, Chapter 1, Section E.)

The standard for assessing factor (1), "research, scholarship, and creative expression," is included in the Manual.

> Successful candidates for tenure at Vanderbilt must be active scientists, scholars, critics, or artists. By the time of tenure review, they must have completed and made available research, scholarship, criticism, or artistic production of such high quality as to gain favorable recognition within their discipline and at a national level. The works may be available through the publication of books and articles, the circulation of manuscripts intended for publication, lectures and presentations, exhibits or performances. Both past achievements and future promise, both the quantity and quality of completed work, determine one's eligibility for tenure.

(Manual, Chapter 1, Section E, Subsection 1.) The evaluation of a candidate's work includes a consideration of "at least three letters solicited by the Chair [of the department] from a list suggested by the candidate of at least six qualified reviewers outside the University, and at least three letters from colleagues chosen by the Chair in

consultation with those department members whose fields are closest to those of the candidate." (College Rules, Section V, A, 4.)

The Manual also defines the standard for assessing factor (2), effectiveness in teaching.[3]

> Candidates for tenure must accept as career obligations the dissemination of knowledge and the nurturing of a spirit of inquiry. To meet tenure standards in teaching, candidates must demonstrate a high level of effectiveness in any of the numerous forms that teaching takes and in any of the settings in which it occurs.
>
> Command of the subject, clarity in communication, and sensitivity to the needs of students are indispensable assets of effective teachers. Candidates for tenure must possess both the skills required to transmit the contents of their disciplines and the capacity to motivate and active pursuit of

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[3] Because it is only Plaintiff's success at meeting criteria (2) and (2) that is in dispute in this case, the standards for assessing factor (3) need not be outlined here.

> new knowledge or insight. Such skills and capacities spring from the same qualities that lead to successful scholarly inquiry.

(Manual, Chapter 1, Section E, Subsection 2.) Under the College Rules, conclusions regarding teaching effectiveness are based on "[e]valuations of teaching by members of the department and by graduate and undergraduate students (see Section V, F), or evidence concerning the candidate's teaching in other institutions, along with comments by Vanderbilt students who have met and heard the candidate; ...." (College rules, Section V, A, 4.) Section V,F of the College Rules provides that each department "shall develop a standard procedure for obtaining student evaluations of candidates for renewal and promotion" and those evaluations should "normally include course evaluations made in accordance with faculty legislation and evaluations prepared by graduate and undergraduate majors in the department." (College Rules, V,F.)

As noted above, the tenured members of the Philosophy Department voted to reappoint Plaintiff at both her two- and four-year reviews. However, at Plaintiff's four-year review, the voting members expressed some concern with Plaintiff's performance as to factors (1) and

(2) -- scholarly contribution and teaching performance.[4] For example, "varying evaluations of her scholarship" were given: "Some find her written work to be not clearly focused, to be a bit scattered, to be in need of editorial assistance. Others do not dispute these observations, but nevertheless find her ideas interesting and important....On the other hand, others suggested that her work is good only if judged by the standards appropriate to book reports." (Venable Aff., Ex. 1 at 4.) Although the Department reported that Plaintiff was considered by all to be an extremely effective teacher of and role model to graduate students, "[i]t was also universally acknowledged that Dobbs-Weinstein's teaching at the undergraduate level is below par; in fact, that it has been quite unacceptable and must improve if she is to be considered tenurable down the road." (Id at 3.) Plaintiff's reappointment at her four-year review was ultimately approved by a six to three margin, with two abstentions. (Id. at 1.) A positive vote for tenure, as provided by the College Rules, indicated that the voter believed the candidate "[was] very unlikely to qualify for

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[4] In regard to factor (3) -- Plaintiff's service to the department, the University, and the field of philosophy -- Plaintiff received very high marks as having done "a remarkable job of getting a foothold in that corner of the professional world that focuses ont he issues central to her research" and as having "brought energy and enthusiasm" to her departmental duties. (Venable Aff., Ex. 1 at 4.)

tenure." (College Rules, Section IV< 5 & 6.) The author of the Department's report on this vote noted that "[he] would judge that one reasonable understanding of an abstention would be something like, 'possible, but unlikely' (as distinguished from 'very unlikely')." (Venable Aff., Ex. 1, at 2.)

Three years later, in the spring of 1994, the tenured members of the Department convened to decide whether to promote Plaintiff to the tenured position of Associate Professor. By a vote of five to four, tenure was approved. However, the concerns that were voiced at Plaintiff's four-year evaluation were again raised. For example, while it was noted that Plaintiff's book manuscript had recently been accepted by an academic press for publication, the departmental report on the vote reiterated that scholarship concerns persisted:

> There is general agreement that by generally accepted standards Dobbs-Weinstein does not write as well as she might, though there is also general agreement that her recent writing...is better than her earlier writing... It is [also] clear that some of her faculty colleagues have found conversations with her mystifying while other colleagues...have found conversations with her to be insightful and helpful.

> Those who oppose tenure add the charge that, apart form the clarity issue, they do not find her presentation of materials always accurate....

(Venable Aff., Ex. 2 at 4-5.)

Discussed "at even greater length" by the voting members of the Department was Plaintiff's success at teaching. The voting members struggled with the "range" of the teaching requirement, disagreeing as to whether quality of teaching should be equivalent in both graduate and undergraduate contexts, or whether one category of instruction was more important than the other; indeed, the faculty noted that "[o]ur criteria refer to reaching, not to the teaching of undergraduates." (Venable Aff., Ex. 2 at 7.) While it was concluded that Plaintiff's teaching of graduate students was exceptional, "[a]t the undergraduate level the date [were] complex." (Id.) The panel went on:

> Evaluation numbers vary. Her performance in freshman seminars has clearly improved ...and...her Medieval Philosophy course is on an upswing. But the undergraduate reaction is mixed and complex. Is the clear success of her teaching at the graduate level plus evidence of some improvement at the undergraduate level enough to satisfy the tenure

> requirement for excellence in teaching? All of us wish the undergraduate record were better but some of us feel that the graduate record plus the bright parts of the undergraduate record are adequate, while others do not.

(Id.)

Under the University's Faculty Manual and the College Rules, a recommendation for tenure by the Department is forwarded to the Dean of the College. The Dean then assesses the recommendation in light of the principles laid out in the Manual and the Rules. he or she has the authority to either concur in the recommendation, or to decline to concur. If a Dean refuses to concur, the Department, by a two-thirds vote, may appeal the decision to the University's Promotion and Tenure Review Committee ("PTRC"). Irrespective of the Dean's decision, the PTRC reviews the tenure file. If the PTRC accepts the Department's recommendation, it recommends tenure to the Provost (even if the Dean has declined to concur). The Provost, in turn, reviews the recommendation and the tenure file, and makes the decision whether to recommend tenure to the Chancellor. The Chancellor then makes a recommendation to the Board of Trust, which makes the final tenure determination. (See Manual, Chapter 1, Section E, Subsection 5.)

In this case, the 5-4 recommendation of the tenured members of the Philosophy Department was forwarded in January, 1994 to then-Acting Dean John Venable.[5] Dean Venable decided that he was unable to concur with the recommendation. In his letter to Dr. Donald Sherburne, Chair of the Department, dated may 26, 1994,[6]Dean Venable explained the various grounds for his refusal to concur.

(1) Research quality. Dean Venable found that the evidence in this area was "mixed," but that ultimately "the case for excellence {was} not made. " (Venable Aff., Ex. 3 at 2.) Venable cited three concerns. First, he noted

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[5] Venable was Acting Dean of the College of Arts and Science at all times relevant to this case, unless otherwise indicated, from September 1, 1992 through July 31, 1994.

[6] Dr. Sherburne was Chair of the Department at the time Dean Venable wrote his memorandum. However, because Dr. Sherburne resigned on May 25, 1997, Dean Venable did not deliver his letter until a successor was appointed. When Professor William Race was appointed the Acting Chair, on June 14, 1994, Dean Venable delivered his Memorandum regarding his refusal to concur in the recommendation of Plaintiff for tenure. Plaintiff was made aware of Dean Venable's decision shortly after it was communicated to Professor Race.

that the input from outside reviewers was far from unanimous. Of nine outside scholars, he found that two reviews were clearly negative and the remaining seven recommended tenure; of those seven, however, he found the content of the letters, on the whole, only "moderately favorable." (Id.) One positive letter he described as "rather superficial" and ultimately "not persuasive." (Id.) Another reviewer who recommended tenure also "offer[ed] the reservation that the candidate has not produced a 'clear synthesis' of her various subjects." (Id.) A third positive review "present[ed] a well-argued case, though one with reservation." (Id.) On the whole, Dean Venable found only three of the seven positive recommendations to be "quite favorable," "glowing," and "strongly supportive." (Id.)

Dean Venable also indicated his concern that some of the scholarly papers included on Plaintiff's *curriculum vitae* did not undergo peer review, and that overall"[o]ne is left with the sense that this is not a body of work that can establish a strong scholarly reputation." (Id.)

(2) Teaching. In this area, Dean Venable disagreed with the Philosophy Department report, which had noted that the voting members felt there was some ambiguity as to whether the College considered the teaching of undergraduates to be as significant as other teaching by tenure candidates. Venable wrote, "There is....no ambiguity in the application of the [teaching effectiveness] criterion in

the College of Arts and Science: to earn tenure, faculty members must teach undergraduates well." (Id. at 3.) In this regard, Venable was troubled by the fact that even though just eight of the twenty-four courses Plaintiff had taught during her Vanderbilt career had been graduate-level, she had taught approximately the same number of undergraduate as graduate students. Consequently, "[Plaintiff] escaped undergraduate teaching to an extent that would seem impossible, particularly so in the period during which she had been advised to demonstrate improvement in undergraduate teaching." (Id. at 4.) The disproportionate teaching of graduate students was due to the typically low undergraduate enrollment in Plaintiff's less advanced courses. Venable found this enrollment indicative of teaching quality, since "[t]he College's general experience is that medieval courses with good teachers (e.g., in English and History) draw well." (Id.) He felt that such inferences were borne out by the assessment given in the Department's report, and by student evaluations Plaintiff received for her undergraduate teaching, which Venable found "do not support a conclusion of high effectiveness." (Id. at 5.) While the Dean gave Plaintiff high marks for willingness to spend time with students outside of class, he concluded that while her undergraduate students "appreciate her efforts on their behalf, [they] do not understand her in class," and that "[t]he overall result is, in my judgment, mediocre undergraduate teaching." (Id.)

Finally, while Venable concurred in the Department's assessment of Plaintiff as an exceptional teacher of graduate students, he expressed concern that not all graduate students who had experiences to contribute about working with Plaintiff were free to do so; he suggested that some were "coerced" into not voicing opposition to Plaintiff's candidacy for tenure. (Id.)

Upon return to school for the new academic year in August 1994, the tenured members of the Philosophy Department met, in accordance with the Manual and the College Rules, to vote on the question of whether to appeal Dean Venable's decision to the PTRC. The Department's vote was the same as the original tenure vote, 5-4, and thus failed to yield the two-thirds margin necessary for such an appeal. Consequently, Plaintiff was informed that her contract with the College would end in May 1995.
In response to Dean venable's action, and the subsequent Departmental vote, Plaintiff filed a grievance in October 1995 with the University's Senate Committee on Professional Ethics and Academic Freedom ("PEAF Committee"). Plaintiff's complaint alleged various improprieties in the process by which her tenure candidacy was reviewed by Dean venable, and by which the Department subsequently considered an appeal.[7] (Venable Aff., Ex. 4.) She also

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[7] The PEAF Committee summarized the violations of University procedure alleged by Plaintiff:

(a) the dean granted an interview with a known opponent of her tenure after receiving the Department's recommendation;
(b) two newly appointed and tenured Department members were excluded from the Department's decision in the appeal vote;
(c) materials were added to her file after the Department's recommendation.

(Venable Aff., Ex. 5 at 3.) These procedural irregularities are also cited by Plaintiff in the instant suit as both suggesting discriminatory motive and supporting her state claims for breach of contract and of covenant of good faith and fair dealing. As to allegation (a), Plaintiff contends that although the College Rules provide that the Philosophy Department speaks only through the Department Chair, rather than through its individual members (Mem. Supp. Mot. summ. J., Ex. B at 6), Dean Venable met with tow opponents of Plaintiff's candidacy after the Department's vote and before issuing his decision. (Pl.'s Resp. Summ. J. at 12.) Moreover, Plaintiff asserts that Dean Venable told students who asked to meet with him to express support of Plaintiff's tenure that the College rules did not permit such meetings. (Id.) As to (b), Plaintiff points out that the new Chair of the Department, Professor William Race, as well as another member of the Department, Dr. Richard Zaner, was not permitted to take part in the departmental tenure

vote, either initially or after Dean venable's refusal to concur. As to allegation (c), Plaintiff avers that after the departmental vote and before Dean Venable's decision was issued, Dean venable solicited and received ex parte communications from opponents to Plaintiff's tenure, (id. at 30), including a letter from Professor John Post which raised questions regarding SUNY Press' acceptance of Plaintiff's manuscript, questions later cited by Venable as partial grounds for his failure to concur.

Plaintiff also complains about three separate unwarranted procedural delays which amplified the hardship endured by Plaintiff in appealing her denial, and in subsequently winning tenure. First, she complains that Dean Venable refused to act as Acting Chair of the Philosophy Department, in contradiction of existing precedent, after the resignation of Professor Sherburne in May 1994, and instead waiting until he had appointed an Acting Chair before communication his refusal to concur to Plaintiff. Consequently, Plaintiff did not learn that she had been denied tenure until June 14, 1994, well after the time when most faculty had left campus and/or Nashville for summer vacations and research sabbaticals. Consequently, Plaintiff's ability to marshal support for an appeal was impeded, and any hearings on the matter had to be postponed until the fall semester. (Pl.'s Resp. Opp. Mot. Summ. J. at 14.) Second, Plaintiff contends that after her appeal was filed during the 1994-95 academic year, delays

contended that both Dean Venable's decision making, and the premises upon which such decision making was based (such as student evaluations), were tainted by discriminatory animus on the basis of gender and national origin. (Id.)

In April 1995, the PEAF Committee issued its findings. While the Committee rejected Plaintiff's allegations that the denial of tenure was motivated by discrimination, it did conclude that there were "several areas of concern" (Venable Aff., Ex. 5 at 8) which warranted -- in accordance with the Manual and College Rules -- the PTRC's review of Plaintiff's file. In particular, the PEAF Committee referenced Dean Venable's letter to the Department and concluded, "[T]he committee is troubled at how simple 'considerations' [about Plaintiff's scholarship and especially her book's publication] have acquired the

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in the hearing process occurred at the behest of Dean Venable, who at that point had been appointed Associate Provost. (Id.) Finally, Plaintiff notes that the Chancellor did not forward Plaintiff's file to the PTRC for more than six weeks after the PEAF Committee recommended that he do so. (Id. at 15.)

Last, Plaintiff argues that University policies were breached when Plaintiff's tenure file was not forwarded to the Department for re-consideration when the vote was taken on whether to appeal Dean Venable's failure to concur.

status of 'reasons' to support a conclusion regarding the merits of her scholarship, when there is so little substantial discussion [in the letter] about the quality of her work." (Venable Aff., Ex. 5 at 10.) The Committee also found that Dean Venable had placed undue emphasis upon Plaintiff's teaching of undergraduates, since her area of study was uniquely specialized, and would more naturally place her in greater contact with graduate students. (Id. at 13-14.)

Consequently, the PTRC reviewed the tenure file, and, in August 1995, issued its conclusions. In its brief report, the PTRC concluded that although Dean Venable's concerns were "legitimate, reasonable and weighty," a recommendation should be made to the Provost to promote Plaintiff to the position of Associate Professor with tenure. The Provost, Dr. Thomas G. Burish, accepted the PTRC's recommendation, which he in turn conveyed to Chancellor Joe B. Wyatt. Chancellor Wyatt concurred in the recommendation; consequently, on November 3, 1995, the University's Board of Trust voted to promote Plaintiff to Associate Professor with tenure. The appointment was made retroactive to the end of the 1993-94 academic year, the time at which Plaintiff would have been promoted but for Dean Venable's refusal to concur in the Philosophy Department's recommendation. Consequently, Plaintiff received back pay for the 1994-95 academic year that reflected the difference between her Assistant Professor salary level and that which she would have earned as an

Associate Professor, as well as the full Associate Professor salary she would have received during the elapsed portion of the 1995-96 academic year had her contract not concluded in August 31, 1995.

Plaintiff filed this action in may 1995. She charges that Defendant's initial denial of tenure was illegally tainted by sex and national origin discrimination, in violation of Title VII and the Tennessee Human Rights Act, and that he subsequent instatement at the tenured level does not account for the lost interest which would have accrued on her salary or compensate at the tenured level does not account for the lost interest which would have accrued on her salary or compensate her for the emotional and professional damages she suffered over the year following her denial of tenure. Plaintiff also brings state breach of contract and covenant of good faith and fair dealing claims stemming from alleged irregularities in the way the University's tenure procedures were implemented in her case.[8] Finally, Plaintiff has added a claim that the University discriminates on the basis of sex in faculty salaries, for which she seeks both retroactive and prospective relief.

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[8] Plaintiff's Complaint also included a libel claim stemming from Dean Venable's statements regarding the acceptance of Plaintiff's book manuscript by SUNY Press, but, as indicated supra, that claim has been abandoned.

III. Legal Standards

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when "the pleadings, deposition, answers to interrogatories, and admissions on file, together with affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In order to grant summary judgment, the Court must determine that a reasonable jury would be unable to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party bears the initial burden of proof that no genuine issues of material fact are present. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Moreover, the facts, and reasonable inferences to be drawn from those facts, must be viewed in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475, U.S. 564, 587 (1986).

To defeat a motion for summary judgment, the opposing party must come forward with "more than just some metaphysical doubt as to the material facts." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). Where the record in its entirety would not lead a jury to find for the non-movant, a genuine issue of material fact does not exist. Id. at 1478. Material facts are those which, under the substantive law governing the issue, might affect the outcome of the suit. Anderson 477 U.S. at 247-48.

Mere allegations of a factual dispute are not sufficient to meet this standard. Id.

Title VII prohibits discrimination in the terms and conditions of employment on the basis of an individual's sex and national origin,[9] and the Tennessee Human Rights Act imports Title VII's protections.[10] To state a claim under Title VII, a plaintiff may provide direct evidence of discrimination (although such "smoking gun" evidence is rarely available), indirect evidence, or circumstantial

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[9] The statue states, in relevant part:
It shall be unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex, or national origin....

[10] The statute specifically provides: "[I]t is the purpose and intent of the General Assembly by this enactment to provide for execution within Tennessee of the policies embodied in the Federal civil Rights Acts of 1964, 1968 and 1972,...as amended..." Tenn. code Ann. §4-21-101(a)(1) (Michie 1991). Claims under the Tennessee law are analyzed according to the same standards as those under Title VII. Trentham v. K-Mart Corp., 806 F. Supp. 692 (E.D. Tenn. 1991), aff'd, 952 F.2d 403 (6th Cir. 1992).

evidence. Woythal v. Tex-Tenn. Corp., 112 F.3d 243, 246 (6th Cir. 1997) (quoting Gagne v. Northwestern Nat'l Ins. Co., 881 F.3d 309, 314-15 (6th Cir. 1989) (citation omitted)). If a plaintiff lacks direct evidence, a jury may still infer discriminatory intent under the burden-shifting framework adopted under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Comm. Affs. v. Burdine, 450 U.S. 248 (1981).

According to this approach, a plaintiff may state a prima facie case of sex and national origin discrimination by presenting evidence that (1) she is a member of the protected class(es); (2) she is qualified to do the job;[11] (3) despite these qualifications, she suffered an adverse employment action; and (4) that "after [the adverse employment action], the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[12] McDonnell Douglas, 411

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[11] In light of the fact that Plaintiff was ultimately granted tenure by the University, the Court finds that there is no doubt that Plaintiff satisfied this portion of the prima facie case. Defendant concedes this point, as well. (Def.'s reply Mem. at 5)

[12] The Court notes that this fourth criterion is inappropriate in this case -- as in most tenure cases -- and

U.S. at 802. Once these four elements are proven, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Id. If the defendant carries this burden, the plaintiff must then produce "sufficient evidence to allow a jury to reasonably reject [the employer's] explanation" as a pretext for discrimination, id. at 804, and to instead conclude that the plaintiff's gender and/or national origin, played a determinative role(s) in the adverse employment decision. Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1023 (6th Cir. 1993). The Supreme Court

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considers it satisfied by the fact that the Philosophy Department was not barred by financial or other constraints from promoting an Assistant Professor to Associate Professor at the time Plaintiff was denied tenure. See Langland v. Vanderbilt Univ., 589 F. Supp. 995, 1003 (M.D. Tenn. 1984), aff'd.772 F.2d 907 (6th Cir. 1985). It should be noted, however, that Plaintiff does allege that the tenured position in the Department for which she was applying was instead given to the husband of the College's incoming Dean. While the distinction is of no significance here, given the Court's conclusion that the fourth criterion of the prima facie case is satisfied in the tenure context irrespective of such evidence, the Court also accepts Defendant's response to this allegation: that the male Philosophy professor was an "add-on" to the Department, rather than someone hired to a tenured position "instead of" Plaintiff. This conclusion will be discusses further infra.

in St. Mary's Honor Center made clear that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 509 U.S. at 518. Moreover, the Court held that "[i]t is not enough...to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." Id. at 519.

IV. Discussion

A.Sex and national origin discrimination tenure denial

The Court rejects Defendant's argument that Plaintiff's discrimination claim is mooted by her subsequent receipt of tenure. if evidence of discrimination exists in this case, Plaintiff clearly still has an action for damages -- for both emotional harm and damage to her professional reputation -- and possibly for interest on the backpay she ultimately received. Thus, the Court will examine Plaintiff's discrimination claims.

The Court is satisfied that Plaintiff has made out a prima facie case of sex and national origin discrimination.[13] Defendant's stated non-discriminatory

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[13] As indicated, the Court examines Plaintiff's discrimination claims because it agrees with Plaintiff that the subsequent grant of tenure by Vanderbilt does not moot

reason for denial of tenure is Dean Venable's disagreement with the voting members of the Philosophy Department -- based on legitimate academic considerations -- that Plaintiff met University criteria for tenure in the areas of teaching and scholarship.

Therefore, the Court turns to the evidence Plaintiff has put forth in support of her claims of pretext.

1. Plaintiff's evidence

Plaintiff has amassed a range of evidence which she alleges supports the conclusion that the decision to deny her tenure was discriminatorily tainted. The evidence maybe divided into the following categories:

(1) Workforce data as evidence of gender discrimination. Plaintiff notes that at the time she was hired

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Plaintiff's these charges. Whether the subsequent grant of tenure mooted Plaintiff's claims under the Tennessee Human Rights Act, and her state law breach of contract and covenant of good faith and fair dealing claims, is a question of what remedies are available for such actions; because this Court finds summary judgment appropriate as to Plaintiff's federal discrimination claims, mootness as to Plaintiff's state claims a matter for the state court, not this one, to decide.

in 1987, she was the first woman employed in a tenure track position in the Philosophy Department at Vanderbilt, and, at all times relevant to this suit, she was the only woman in a department of eleven men. She also states in her deposition that during her employment at Vanderbilt, approximately 48 men received fellowships, while only 3 women did, (Dobbs-Weinstein Dep. at 93-95), although no documentation is provided for this assertion. Plaintiff notes that as of october 1, 1993, there were 138 male professors and 14 female professors at any level, including both tenure and tenure track positions, in the College of Arts and Science at Vanderbilt. At the same time, there were 69 male Associate Professors and 12 female Associate Professors (the tenured rank to which Plaintiff sought promotion) at the College.[14] (Pl.'s Resp. Opp. Mot. Summ. J. at 29.) Finally, Plaintiff notes that "[o]ver 160 female faculty members in the College of Arts and Science between September 1, 1986 and August 1, 1995 are no

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[14] Defendant disagrees with the first of these figures: It cites its Work Force Analysis as showing that as of October 1, 1993, there were 250 male professors and 55 female professors in tenured or tenure-track positions (tenured professor and associate professor, and untenured assistant professor level) (Def.'s Resps. to Add'l Facts at 53). In other words, in October 1993, women professors of all ranks comprised 22 percent of the total number of professors, as opposed to the 10 percent cited by Plaintiff.

longer employed by Vanderbilt University." (Id.)

(2) Personal bias among Department members as evidence of gender and national origin discrimination. In addition to noting that opponents of her tenure were also opponents of the philosophical theories she espoused, Plaintiff claims that three of the four opponents also "made inappropriate comments of a sexual nature to either [Plaintiff] of students." (Pl.'s Resp. Opp. Summ. J. at 8.) Plaintiff does not provide any further support for these allegations. Plaintiff also asserts that members of the Philosophy Department were unwilling to accommodate absences of faculty members due to Jewish holidays.[15]

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[15] Defendant points out that Plaintiff's claim is one of national origin discrimination, not religious discrimination, and consequently that evidence of anti-Semitism is irrelevant to her claim. The Court considers such evidence, however, since Plaintiff's identities as an Israeli and as a Jew are sufficiently entwined that a separation of one kind of bias from another would be, as both a legal and practical matter, illogical. Cf Jefferies v. Harris Co. Comm. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (recognizing that plaintiff's identities as African-American and as woman could not be isolated for purposes of analyzing her discrimination claim); accord, Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994) (applying same logic to Asian-American women).

(3) Male professor tenured "in place of" Plaintiff. Plaintiff argues that the incoming Dean of the College of Arts and Science, Madeline Goodman, conditioned her acceptance of Vanderbilt's job offer on the provision of a tenured Philosophy Department position for her husband, Lenn Goodman. This argument appears to be conjecture, based on the fact that Lenn Goodman's specialty is the same as plaintiff's (medieval philosophy), and that he asked to take over her courseload after Plaintiff's denial of tenure. No further facts are provided to transform this correlation into a casual factor for denial of Plaintiff's tenure.

(4) Evidence of national origin discrimination at Vanderbilt generally. Plaintiff also argues that there is "substantial other evidence of bias at Vanderbilt based on national origin." (Pl.'s Resp. Opp. Mot. Summ. J. at 28.) Plaintiff cites unspecified damage to Jewish religious symbols across campus, which included anti-Semitic graffiti on Plaintiff's office door.

Plaintiff also submits the affidavit of pascal Massie, a foreign-born teaching assistant pursuing her Ph.D. in the philosophy Department. massie contends that during her mandatory training at the Teaching Center -- a supplemental training that all teaching assistants were required to fulfill -- she, and other foreign students, were not 'given the same depth of evaluation that foreign-born teaching assistants were given." (Massie Aff. at 1.) moreover, she alleges that

"[a]mong the advise given by the Teaching Center was advice to foreign students to bathe frequently, leaving the impression that those giving the advice did not understand that it was the practice of foreign-born students to bathe frequently." (Id. at 2.)

(5) Evidence of national origin discrimination in student evaluations. Plaintiff's primary evidence of national origin discrimination is Vanderbilt's reliance upon student evaluations in making tenure decisions, evaluations which she claims are inherently biased against accented speakers such as herself. Plaintiff presents the report of Dr. Donald L. Rubin, a professor of Speech Communication and Language Education at the University of Georgia. Dr. Rubin's area of expertise is the interaction between language and attitude, and specifically, "the impact of speakers' language variety on listeners' perceptions and comprehension of those speakers on listeners' perceptions and comprehension of those speakers." (Rubin Report at 1.) Dr. Rubin states that "[i]n general, my study of undergraduates' responses to international instructors leads me to the overall conclusion that college students tend to negatively judge the teaching proficiency of international instructors, and even to comprehend their classroom lectures poorly." (Id.) Dr. Rubin also suggests that negative student reactions and lowered comprehension rates occur in studies even when an instructor is merely identified as a non-U.S. native, but where the instructor's speech is unaccented.

(Id.) These results, Dr. Rubin surmises, are the result of prejudices which lead students to "hear what they expect to hear," in other words, sub-standard teaching from non-native English speakers.[16] (Id. at 2.) Interestingly, however, Dr. Rubin's research has not led him to recommend the elimination of student evaluations as a basis for employment decisions. Indeed, he notes that his research ultimately "indicates that such evaluation is in general a reasonably accurate measure of teaching effectiveness," (id.), though use of such evaluations should be tempered by an understanding of their shortcomings and potential biases.

Dr. Rubin's observations about the applicability of these findings to Plaintiff's case are based upon his viewing of a videotape of Plaintiff delivering a simulated lecture.

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[16] Dr. Rubin's studies have also revealed that accented English is only one extraneous factor which may unduly influence students' reactions to their instructors. For example, he found that instructors who are unattractive, or who otherwise fail to conform to societal expectations (such as women who act or dress in stereotypically unfeminine ways) are also penalized by listeners. He notes in his report that as a result of these other factors, "it may not be the case that international or non-native speaker status is the most powerful extraneous factor affecting student evaluations." (Rubin Report at 2.)

(Id.) He categorizes Plaintiff's speech as "extremely intelligible," though certain pronunciations make it clear that she "is not a native speaker of mainstream North American English" and "is an international." (Id. at 3.) Most notably, Dr. Rubin found that while "it is plausible that these identifications could result in student activating stereotyped expectations of this speaker," he concludes:

> To more adequately assess whether this speaker is indeed subject to negative student expectancies based on language and national origin, one would need to conduct an experiment in which this particular speaker contributes one set of stimulus materials. Under controlled conditions, a simulated lecture delivered by this instructor would be judged by a sample of undergraduate students. A similar sample of students would under the same controlled conditions respond to a lecture delivered by a person of similar physical attractiveness who would be identified as mainstream North American. For further comparison, vocal tracks could be switched between the two speakers.

(Id. at 3-4.) (Emphasis added.) No such study was conducted by Dr. Rubin or by any other expert.

(6) Suggestion of bias by Dean Venable. The bulk of the evidence presented by Plaintiff comprises statements and actions attributed to Dean Venable which allegedly illustrate his bias against women and foreign-born persons. Each incident shall be explained in turn:

(a) Plaintiff submits the affidavit of English Professor Margaret Doody, who approached venable in the Fall of 1993 regarding the hiring of a temporary visiting professor to teach comparative literature. Professor Doody's affidavit states that Venable in granting such permission, told Doody, "Whatever you do, don't hire a foreigner. All out troubles come from foreigners." (Doody Aff. at 1.)

(b) Plaintiff also submits the affidavit of Assistant Professor Denise Kirschner of the Mathematics Department. In the spring of 1994, Professor kirschner complained to Dean Venable about a comment made to her by a male Mathematics professor: Kirschner says that this professor told her that "in order to hire a woman in the Department of Mathematics at Vanderbilt, the woman must be better than any of the male candidates." (Kirschner Aff. at 1.) Kirschner contends that when she told Dean Venable about this comment, Venable "was patronizing to me and simply advised me that I must have misunderstood

the Department Chair," (id.), as did Pat Pierce, a woman whose position at Vanderbilt is not identified by either Kirschner or Plaintiff. (Id. at 2.) The male professor's alleged remarks were not investigated, to Kirschner's knowledge, nor was he disciplined. (Id.) Kirschner also describes the "agitat[ion]" of the aforementioned math professor at a seminar held in the spring of 1994 regarding gender discrimination in the physical sciences.

(c) The only other woman in whose tenure recommendation Venable failed to concur during his tenure as Acting Dean was Dr. Phyllis Frus, an Assistant Professor in the English Department. Plaintiff notes that when Frus appealed her denial, the PEAF Committee found evidence that two male professors in the Department, during the departmental meeting at which Frus' tenure was considered, spoke of Frus' gender and age in a derogatory manner. This discussion was included in the minutes of the meeting, which Dean Venable saw when he deliberated on whether to concur in the Department's tenure recommendation. Dean Venable "failed to discipline, counsel or investigate the inappropriate statements relating to age and gender." (Pl's Resp. Opp. Mot. Summ. J. at 27.)

(d) Dr. Sabine Cramer, an Assistant Professor in the German and Slavic Department from 1991 through 1996, submitted an affidavit about her experience with Dean Venable. Dr. Cramer was asked to testify before a committee investigating charges of sexual harassment brought against the male Chair of the Department. Dr. Cramer states in her affidavit that she was reluctant to testify because she feared endangering her future chances for contract renewal and for tenure, and that she conveyed these concerns to Dean Venable. (Cramer Aff. at 2.) Dean Venable, she says, assured her that the professor against whom Dr. Cramer was scheduled to testify would not be permitted to participate in Dr. Cramer's renewal evaluation. (Id.)
Contrary to these assurances, the professor was permitted to participate in the vote regarding Dr. Cramer, and he (along with the other two male professors in the Department) voted against her. (Id.) Dr. Cramer's contract was not renewed.

2. Assessment of Plaintiff's evidence

The Court undertakes its examination in light of the fact that tenure decisions are unlike virtually any other kind of employment decision, and consequently, they warrant a slightly different kind of scrutiny from the courts. See Zahorik v. Cornell Univ., 729 F.2d 85, 92-93 (2d Cir.

1984) (nothing that the tenure decision gives rise to a lifetime personal service contract, is often non-competitive and thus scrutiny of other candidates for comparisons is of limited value, is made through a decentralized procedure, considers multiple subjective criteria, and sparks unusually high levels of disagreement). While the tenure decision's unique context certainly does not insulate universities from the reach of anti-discrimination statues, the Court must also be cognizant of the well-established principle that a court considering a tenure decision must refrain from substituting its subjective judgment about a teacher's qualifications for those of professional scholars. See, E.G., Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 975-76 (8th Cir. 1991) (courts must not "sit as a 'super personnel council' to review tenure decisions"); Zahorik, 729 F.2d at 93 ("triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion"); Smith v. University of North Carolina, 632 F.2d 316, 345 & n.26 (4th Cir. 1980) (noting the "anti-interventionist policy" of courts regarding tenure decisions); Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980) ("[d]eterminations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as a mechanism to obscure discrimination, they must be left for evaluation by the professionals"). Rather, a court's inquiry must focus on what actual evidence directly or indirectly implicates

discrimination as the motive behind an institution's stated academic reasons for denying tenure. Smith, 632 F.2d at 345-46.

The Court finds that the evidence before it fails to create a genuine question of whether the decision to deny Plaintiff tenure was motivated by sex and/or national origin bias. Although Plaintiff's denial of tenure was ultimately found to be improper, this finding, and the other evidence presented by Plaintiff, do not sufficiently erode the substantial evidence supporting the legitimacy of Defendant's stated academic reasons for that denial.[17] Regardless of whether Plaintiff believes the criticisms of her

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[17] Plaintiff argues that the University's ultimate award of tenure itself provides "the most powerful proof" of pretext, because it proves that Plaintiff "had, in fact, met the standards set forth in the Faculty Manual." (Pl.'s Resp. Opp. Mot. Summ. J. at 23.) This assertion is misguided. it is true that Plaintiff's case would be demonstrably weaker if two review boards had agreed that tenure was inappropriate. However, the fact that she was ultimately deemed qualified for tenure does not warrant the conclusion that the initial decision of "unqualified" was based on discriminatory motive. To read pretext into every overruled tenure decision would substantially alter the roles of both the university bodies, such as the PEAF Committee and PTRC, and courts such as this one.

teaching and scholarship to be fair or warranted, they are criticisms which were raised throughout her employment at Vanderbilt by a number of different parties who had varying degrees of investment in her future. These concerns emerged as early as 1991, the time of Plaintiff's fourth-year reappointment vote: as discussed supra, "varying evaluations of her scholarship" were given at the time by her colleagues within the Department, and "[i]t was also universally acknowledged that Dobbs-Weinstein's teaching at the undergraduate level is below par; in fact, that it has been quite unacceptable and must improve if she is to be considered tenurable down the road." (venable Aff., Ex. 1, at 3-4.) Ultimately, Plaintiff's reappointment was approved by a six to three margin, with two abstentions. (Id. at 1.) Similarly, the later 5-4 tenure vote within the Department indicates that Dean Venable's objections -- while ultimately overruled by the PEAF Committee and the PTRC -- were rooted in academic concerns over which reasonable scholarly minds could differ. Additionally, the Department's denial of tenure and Venable's failure to concur were in part based on evaluations received from scholars at SUNY Press and at other institutions, who gave a range of assessments of Plaintiff's qualifications. Moreover, the negative student evaluations which were received echoed the concerns over intellectual clarity cited by Plaintiff's colleagues themselves, indicating to this Court that the criticism from Plaintiff's peers and the Dean was rooted more in substance than in pretext:

> It is clear from the letters of students that classes taught by Dobbs-Weinstein often begin by generating a certain amount of confusion and puzzlement -- some of the graduate students, and undergraduates, who ended up feeling enormously indebted to her teaching remark that their initial exposure to her in classes left them confused.

(Venable Aff., Ex. 2 at 4-5.) Commenting on this phenomenon, Professor Sherburne, one of Plaintiff's ultimate supporters, wrote, "I fully understand the experience from which [Plaintiff's} critics are speaking; I have sometimes been mystified [by her comments and questions] and yet sometimes have felt that indeed there is something there she is trying to get at, even if I can't quite put my finger on it any more than she can." (Id. at 5.)

Indeed, the degree to which Plaintiff's supporters agree with her detractors is striking in this case. Professor Sherburne summarized the Department's narrow tenure vote in this way:

> [I]t is not a simple, straightforward matter to determine whether [Plaintiff makes philosophical sense and contributes to the field]. Five of us, all of whom freely acknowledge that there are problems with

> clarity and connecting links...., feel that the scholarly accomplishment....merits tenure, especially when one focuses on the work done in medieval philosophy. Four of us did not.... The four who voted against tenure agreed that in their conversations with the candidate and in their reading of her manuscripts, they did not encounter the quality of mind that they feel a candidate has to exhibit to be worthy of tenure. The five who voted for tenure were, at least some of them, quite willing to agree that the candidate does not have the kind of mind and style that is viewed as standard in some traditions, but they concluded that in its way it gets the philosophical job done and that therefore the candidate merits tenure.

(Id. at 6.) (Emphasis added.)

Finally, the Vanderbilt academicians charged with review of Plaintiff's appeal also found significant room for debate about tenuring her. The PEAF Committee indicated in its report that "all members of our Committee considered this a close and unusual case" and that "[t]he concerns raised by Dean Venable were legitimate, reasonable and weighty." (Id., Ex. 6 at 1.) The PTRC noted that its own members who dissented from the tenure recommendation considered Plaintiff's case "a close one." (Id. at 3.)

Of particular note in this regard is the PEAF Committee's conclusion that while it ultimately found Dean Venable's reasoning conclusory rather than supported by the realities of Plaintiff's scholarly record, it did not find that his failure to concur was a "product of discrimination." (Id., Ex. 5 at 10.) In fact, both the PEAF Committee and the PTRC indicated that if any improper motivation was to be attributed to the Dean, it was his unwillingness to take into account the fact that a vigorous ideological debate had divided the Philosophy Department and the discipline generally: As noted in the Department's tenure vote report, opponents to Plaintiff's tenure fell within the "Anglo-American empirical tradition" (otherwise known as the "analytic" tradition) which "wants to get perfectly clear on all the details of the parts and thinks that with that done the overall picture will fall into place." (Id., Ex. 2 at 5.) Plaintiff, on the other hand, fell into the "continental tradition" of philosophy, which "thinks that one proceeds from the whole down to the parts because only in the light of the overall picture does the meaning and significance of the parts come into view. Work produced from within this latter tradition....often looks fuzzy and disjointed to those working within the assumptions of the former tradition..." (Id.)

Both committees found that his pedagogic division may have accounted for much of the contentiousness of Plaintiff's candidacy: the PEAF committee criticized the

Dean for overestimating the importance of the close departmental vote on Plaintiff's candidacy because "the split vote may not be an accurate reflection of her merit" but rather of the deep division currently represented in the department," (id., Ex. 5 at 15.), while the PTRC noted that poor reviews of Plaintiff's scholarship were difficult to evaluate "in part because of disagreements within [Plaintiff's] own department, and in part because of an apparent division within the discipline of philosophy generally about what constitutes quality research." (Id., Ex. 6 at 2.) Indeed, Plaintiff herself also suggests that this ideological rift fueled the opposition to her candidacy, given her observation that "[t]he four professors who voted against recommending tenure for [Plaintiff] were all analytic professors." (Pl.'s Resp. Opp. Mot. Summ. J. at 7.) However, while it is unfortunate and even unfair that such disputes may have clouded the tenure decision her, "academic and intellectual bias is not evidence of sex discrimination." Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 541 (3d Cir. 1992) (reviewing denial of law firm partnership).

In sum, such vigorous debate among Plaintiff's peers about her merits strongly indicates that Defendant's initial denial of tenure was motivated by a truly legitimate nondiscriminatory reason for denial of tenure. The strength of the evidence supporting this contention places the responsibility for creating a material question of pretext

squarely at Plaintiff's feet. Ultimately, this is a burden that Plaintiff fails to carry.

As a threshold matter, the Court agrees with Plaintiff that evidence of skewed gender ratios can provide important context to allegations of sex discrimination and may help establish pretext in individual disparate treatment cases. See McDonnell Douglas, 411 U.S. at 804-05. Thus, the Court assesses Plaintiff's other evidence of discrimination with cognizance of the fact that she was the first woman hired into a tenure-track position within the Department, that there were no women graduate students in the Department at that time, and that she remained the only woman in the Department through the time of her tenure vote. Plaintiff's other date, however, about the number of tenured and non-tenured women in the entire College of Arts and Sciences and about the number of women who left the College from 1986 and 1995, however, are less helpful. Such "raw numerical comparisons," when not accompanied by any particularized discussion of qualified application pools or comparisons to the number of men who left, are of minimal probative value and do not allow definitive conclusions regarding bias at the College Ezold, 983 F.2d at 543 (and cases cited therein); see also Shaw v. Monroe County, No. 95-70107, 1996 WL426483, at *8 (E.D. Mich. Apr. 18, 1996) (plaintiff's citation of low rates of minority employment at defendant employer not probative because "statistics without correlation are indicative of no

meaningful inference or conclusion") (quoting Long v. City of Saginaw, 911 F.2d 1192, 1201 (6th Cir. 1990)); Zahorik, 729 F.2d at 95. This is especially true in the academic setting, where departmental needs for adding faculty may vary dramatically, both from department to department and from year to year, and where decisions about hiring faculty -- as noted supra -- are highly subjective. See Zahorik, 729 F.2d at 95. Without contextual analysis of the statistics themselves, the statistics' value is creating context in individual cases is substantially undermined. Moreover, Plaintiff ignores the Supreme Court's important caveat to the principle that statistical data may aid an individual's case: " We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." McDonnell Douglas, 411 U.S. at 805 n.19 (quoted in Lieberman v. Gant, 630 F.2d 60, 69 (2d Cir. 1980)). As discussed supra, the Court believes that such a reason -- albeit later overturned -- has been articulated by Defendant.

As to Plaintiff's allegation that incoming Dean Madeline Goodman required the Philosophy Department to hire her husband, whose specialty placed him in competition with Plaintiff, Defendant has denied that Lenn Goodman either shared Plaintiff's specialty or that he was hired instead of her; rather, Defendant states that it hired Lenn Goodman as an additional member of the faculty,

irrespective of the tenure decision regarding Plaintiff. (Def.'s Resp. Add'l Facts at 24-25, ¶65.) The PEAF Committee also concluded: "Although the appointment of Professor [Lenn] Goodman overlapped with the time in which the [Plaintiff's] tenure decision occurred, we accept Mr. Venable's assurances that there was no connection between the two decisions and recognize that the University's practice of offering positions to spouses of appointed persons occasionally results in additional persons within departments." (Venable Aff., Ex. 5 at 7.) The Court finds no reason to question the Committee's assessment of Professor Goodman's hiring.

The Court is thus left to consider the anecdotal evidence that Plaintiff claims is suggestive of gender and national origin bias on the part of her colleagues and Dean Venable, and her contention that the evaluations by her students were biased and should not have been the basis for her tenure denial.

It is certainly relevant to this Court's inquiry to know how women and Jews were treated within the Philosophy Department, and Dean Venable. Any statements or behavior by any of the decision makers that were derogatory on the basis of any protected characteristic may provide evidence of discrimination. Wilson v. Wells Aluminum Corp., No. 95-2003, 1997 WL 52921, *5 (6th Cir. Feb. 7, 1997) (citing Cooley v. Carmike Cinemas, Inc.,

25 F.3d 1325 (6th Cir. 1994)); Ezold, 983 F.2d at 546 ("[P]roof of a discriminatory atmosphere may be relevant in proving pretext since such evidence 'does tend to add "color" to the employer's decision making processes and to influences behind the actions taken with respect to the individual plaintiff.'") (quoting Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987)); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438 (9th Cir. 1990) (comments indicating bias are "clearly relevant" to a disparate treatment claim).

There is more to this principle, however: without evidence that illegal animus affected the contested employment decision itself, such "atmospheric" evidence is not enough to withstand summary judgment. See, e.g., Gartman v. Gencorp, Inc., 120 F.3d 127, 131 (8th Cir. 1997) ("Not all comments that reflect a discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision.") (citations omitted); Ezold, 983 F.2d at 547 (gender-based comments by single person not sufficient to show "such a pervasive hostility to women at [law firm]... was more likely the result of discriminatory bias than [law firm's] perception of [plaintiff's] legal ability"). This is not a hostile environment sexual or national origin harassment case. To prove that her colleagues and the Dean denied her tenure because of her gender and national origin, she must prove not only how she (and other women) perceived the

climate for women and Jews in the Department -- and at the College generally -- but how that climate actually infected the tenure process in her case, and played a determinative role in denying her tenure. See Price Waterhouse v. Hopkins, 490 U.S. 228, 277-78 (1989) (O'Connor, J., concurring) ("[S]tatements by... decision makers unrelated to the decisional process itself [cannot] suffice to satisfy the plaintiff's burden [of persuasion]."); see also Wilson, 1997 WL 52921 at *5 ("[W]orkplace remarks furnished as evidence of discrimination [must be] clear, pertinent, and directly related to decision-making personnel or processes in order to prove discriminatory intent."); Venters v. City of Delphi, 123 F.3d 956, 973 (7th Cir. 1997) ("Evidence of discriminatory motives must... have some relationship with the employment decision in question; inappropriate but isolated comments that amount to no more than 'stray remarks' in the workplace will not do.") (citation omitted); Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1333 (6th Cir. 1994) (anecdotal evidence of discriminatory comments must "go[] beyond... vague, ambiguous, and isolated comments").

No such nexus is established by the anecdotal evidence presented here by Plaintiff. She has not compared the criticisms levied at her qualifications to those levied at male tenure candidates, in order to expose them as illegitimate. She has failed to provide a single comment or incident, contemporaneous or otherwise, which would link

alleged gender or ethnic animus on the part of Department and/or Dean Venable to the tenure decision making process in her case. Rather, her evidence is too removed, either temporally or in substance, to indicate that Plaintiff's gender and/or national origin played a determinative role in her tenure denial.

The Court notes that the evidence regarding Dean Venable's alleged insensitivity to the concerns of women faculty and to the hiring of foreign instructors,[18] and

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[18] Dean Venable has denied that he made assurances to Dr. Sabine Cramer that a male professor against whom she testified would not be involved in her tenure decision. (Venable. Supp. Aff. at 5, ¶7.) He claims that he did question the male mathematics professor who allegedly told Professor Denise Kirschner that women had to be "better" than male candidates in order to be hired by the department. (Id. at 4, ¶5.) Venable also asserts that he had no knowledge of allegedly biased comments made by English Department members during the tenure vote regarding Professor Phyllis Frus, and only learned of the comments nearly a year later, when the PEAF Committee issued its report on the matter. He notes that the PEAF Committee concluded that such comments were "entirely speculative." (Id. at 4-5, ¶6.) Dean Venable has not offered a refutation of Professor Margaret Doody's account of their conversation regarding the hiring of a visiting

alleged irregularities in the tenure review process, are together the only portions of Plaintiff's case which come close to suggesting improper motive. Dean Venable's alleged behavior toward Doody, Kirschner, Frus, and Cramer, if true, could be perceived as evidence of the kind of "deep-rooted, ongoing pattern [of discriminatory attitude] that is anything but isolated." Cooley, 25 F.3d at 1331. Moreover, Plaintiff is correct in arguing that an institution's deviation from its established policies can "discredit the legitimacy of the [institution's] articulated reason for... the denial of tenure." Kunda, 621 F.2d at 545; see also Brousard-Norcross, 935 F.2d at 977 (quoting Zahorik, 729 F.2d at 93.)

Plaintiff's evidence is insufficient, however, to create a genuine issue of pretest here. First, Dean Venable's alleged insensitivity to the concerns of women faculty has not been shown to have any link to his tenure decisions, either in general or in relation to Plaintiff. During his appointment as Acting Dean, Venable acted on fifteen tenure recommendations. (Venable Aff. at 1-2, ¶2.) In the case of male candidates, Venable concurred in eight of nine departmental recommendations; in the case of female candidates, Venable concurred in four of six departmental recommendations. The two recommendations of women in which Venable did not concur were Plaintiff and Phyllis

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professor in comparative literature.

Frus, discussed supra. Such statistics are drawn from too small a sample to suggest a pattern of bias in Venable's tenure decisions.[19] See Langland, 589 F. Supp. at 1005 (where dean had concurred in 29 of 37 male tenure recommendations, and 1 of 3 female tenure recommendations, statistical sampling insufficient). Furthermore, Plaintiff's complaint that Dean Venable required an excellence in undergraduate teaching that he did not ask of male tenure candidates is flawed for two reasons: first, as discussed extensively supra, there appears to be genuine contention among all academicians involved in Plaintiff's case as to how much weight undergraduate teaching should have been accorded, and to what extent Plaintiff's undergraduate teaching should be balanced with other criteria. This contention undermines a conclusion that Venable's focus on the undergraduate teaching was motivated by bias. Second, Plaintiff's does not provide evidence regarding the tenure decisions involving male candidates; consequently, the Court is unable to assess for itself whether the undergraduate teaching criterion was imposed selectively or in an otherwise bias manner.

These statistics are even less probative of discrimination when it is considered that Dean Venable's successor, Madeline Goodman, concurred in Venable's conclusion that Professor Frus should not be granted tenure. (Venable Supp. Aff. at 5, ¶6.)

The alleged procedural deviations by Dean Venable also are insufficient, standing alone, to support an inference of sex and/or national origin discrimination. As to Dean Venable's meeting with or accepting ex parte letters from faculty members after his receipt of the Philosophy Department's report, but before he issued his decision on Plaintiff's file, Venable notes that the rules outlined in the Faculty Manual do not preclude such meetings. He also told the PEAF Committee that in his one meeting with an opponent of Plaintiff's tenure, he "suggest[ed] to this person that he would not consider any matters he might raise in conversation; he then invited the person to submit a letter, which he also did with other members of the department." (Venable Aff. Ex. 5 at 16.) These letters were then submitted to Plaintiff's tenure file. The PEAF Committee, while noting that the propriety of accepting such communications is an ongoing matter of dispute within the university, did not find that their acceptance in Plaintiff's case tainted her tenure decision.[20] (Id. at 16-17.)

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[20] The fact that Plaintiff's full tenure file was not forwarded to the department of consideration before its vote cannot be found to have improperly skewed the Department's vote, since the same parties were voting as in the first vote, and were consequently well appraised of the issues before them. Plaintiff does not cite any portion of the Faculty Manual or the College Rules which mandates a re-evaluation of the tenure file before an appeals vote is

Particularly in light of the vagueness of Plaintiff's description of the content of such communications, this Court is in no position to disagree. The PEAF Committee also found that it was fair for Professor Race, the new Chair of the Philosophy Department who oversaw the vote on whether to override Dean Venable's failure to concur, to prohibit two new senior members of the department from participating in the vote.[21] One of these faculty members

did not have tenure in the department, and the other had not

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taken, nor does she present evidence that members of the Department asked to see such letters, or that the letters would have changed the breakdown of the departmental vote. The Court notes that at the Department's meeting to discuss and vote on the appeal, Professor Race did read portions of Dean Venable's letter outlining his reasons for failing to concur.

[21] Plaintiff does not indicate why the exclusion of these faculty members from the vote contributed to an unfair result in her case, but the Court presumes it is because Plaintiff believes these faculty to be her supporters, and thus that they could have altered the 5-4 vote against appealing Dean Venable's decision. The Court notes that even if this were the case, and the vote had instead been 7-4 in favor of pursuing an appeal, such a vote still does not provide the necessary two-thirds margin.

taken part in the original tenure discussion and vote.[22]

Finally, the Court does not find that Plaintiff's allegations regarding the temporal delay in the transmission of Dean Venable's decision to her (through the new Chair, Professor Race) and in the tenure appeal process raise the specter of unlawful discrimination. While neither the PEAF Committee nor the PTRC addressed these issues, the Court notes that the Faculty Manual only provides that "written notices of renewal or non-renewal normally will be made by June 1 of the year preceding their final year." (Manual, Chapter 1, Section D.) (Emphasis added.) Given the fact that Professor Sherburne resigned as Chair of the Department the day before Dean Venable authored his letter regarding his failure to concur--prompting Dean Venable to begin a search for a new Chair--the Court is inclined to find that the delay in informing Plaintiff of the Dean's decision

until after Professor Race was named Chair is not probative

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[22] Plaintiff also complains that, on the same logic, Professor Race should not have been allowed at the department's appeal meeting. However, the Court is satisfied that Professor Race only convened the meeting, but did not express an opinion about the vote or participate in the vote itself.

of discrimination.[23]

The Court now turns to Plaintiff;s allegations regarding national origin bias in the student evaluations, and finds that no material question of fact exists on this question. It is well established that "student reaction is a legitimate, nondiscriminatory factor on which to evaluate tenure candidates." Brousard-Norcross, 935 F.2d at 976. Such an assumption is apparently not questioned by the Plaintiff; indeed, Plaintiff's own expert, Dr. Rubin, endorses the use of student evaluations in the aggregate, although he recommends that each case be studied individually to prevent hidden bias from infecting the tenure process.

Plaintiff has failed to show that any such bias was present in the evaluations. No question has been raised as to the framing of the evaluation form's questions. No evidence of biased student comments on the forms has been presented. Plaintiff's only evidence of bias is the report of Dr. Rubin, which merely outlines the phenomenon by which accented instructors may be penalized by their students. However, Dr. Rubin specifically notes that he would have

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[23] Because Plaintiff offers no evidence in support of alleged interference by Dean Venable in the appeals process--which Plaintiff claims added to the delay in resolving her case-- the Court does not consider that allegation.

to conduct further study to conclude whether Plaintiff herself was penalized in this way.

Plaintiff does not even provide the Court with the actual evaluations she received; rather, the Court must rely on the summaries of the evaluations offered in the Department's and Dean Venable's reports, and on the expert report of Dr. William E. Cashin submitted on behalf of Defendant. Dr. Cashin's report indicates a significant fact: first, Plaintiff "in general did not receive low ratings." (Cashin Aff., Ex. 2 at 2.) In comparison with other members of the Philosophy Department, it appears that Plaintiff received lower ratings than her colleagues in the 100- and lower 200-level courses, but higher ratings in the more advanced 200- and 300-level courses. (Id.) Indeed, when Plaintiff's ratings in all her courses are averaged, she is found to have received higher average ratings than her colleagues. (Id.) In light of these statistics, it becomes clear that it is not all student evaluations to which Plaintiff objects, but only the fraction submitted by those students in her lowest-level courses, courses in which the students are presumably younger undergraduates and/or are receiving their first exposure to philosophy. Indeed, as the PEAF Committee noted, Plaintiff's negative student evaluations came from "a relatively small number of undergraduate students -- at most, roughly half of the small pool of undergraduate students she has taught." (Venable Aff., Ex. 5 at 14) If tenured faculty members had such disparate

reactions, the Court finds it quite plausible that younger or less sophisticated philosophy students would have more difficulty with Plaintiff's courses, leading to less positive evaluations.

Of course, it is also possible that such students are also more susceptible to extraneous influences, such as Plaintiff's accent. The PEAF Committee indicated that this was the flaw in allowing such a small group of evaluations to control the tenure process for Plaintiff, given the "multiple possibilities for prejudice that could occur in the evaluations, just because of the person in question and the character of her subject matter: [Plaintiff] is Jewish, female, foreign, active in issues regarding sexual orientation, and she challenges student's views of religious truth and reality in the context of her courses on medieval philosophy. She has been the target of ethnicity-religion-based attacks in the form of vandalism and graffiti while at Vanderbilt." (Venable Aff., Ex. 5 at 14.) (Emphasis added.) Such trepidation is the responsible approach, in light of studies such as Dr. Rubin's, as well as related work by legal academicians regarding the unconscious psychological processes by which race negatively affects perceptions. See, e.g., Charles R. Lawrence III, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). However, the conclusion that the Department and Dean Venable did not consider the potential for discrimination in a small number of negative

evaluations does not translate into the conclusion that such discrimination actually occurred in those evaluations. Indeed, the PEAF Committee itself found that "we have not received evidence of prejudice in the evaluations." (Venable Aff., Ex. 5 at 14)

The anecdotal date provided by Plaintiff regarding her students' attitudes does not alter this conclusion. Plaintiff states that she was "told by some undergraduate students that she misrepresented Christian philosophers because she is a "Jew" and that "some undergraduates have asked Dobbs-Weinstein how a Jewish woman could teach Christian philosophy." (Pl.'s Resp. Opp. Mot. Summ. J. at 41) According to Defendant's filings, however, there were evaluations for twenty-four courses which formed the basis of Plaintiff's teaching record. Any link between the negative evaluations drawn from this large sampling, and the unspecified anti-Semitic graffiti at Vanderbilt and remarks made to Plaintiff by a few students about her teaching of Christian philosophy, is simply speculative. It is certainly a connection too tenuous to warrant a finding of national origin discrimination in all, or even a portion, of the student evaluations in Plaintiff's case.

Plaintiff's evidence regarding alleged national origin discrimination within the Philosophy Department suffers from the same defect. The remark allegedly made to Pascal Massie at the Teaching Center is in no way linked to

members of the Department or to Dean Venable, and will not permit the inference that Plaintiff was hindered in the tenure process because of her national origin. While unwillingness of unspecified faculty members to accommodate Jewish holidays could conceivably be considered, along with other evidence related to Plaintiff's tenure consideration specifically, to raise an inference of hostility to an Israeli colleague, it cannot, taken alone, create such an inference. Again, this is particularly so in light of the subsequent findings by both the PEAF Committee and the PTRC that Plaintiff's tenure candidacy presented a "close case" (Venable Aff., Ex. 5 at 1, Ex. 6 at 3) on the basis of the "legitimate, reasonable and weighty" concerns raised by her detractors within the Department. (Id., Ex. 6 at 1.)

B. Sex discrimination -- wages

Plaintiff makes both individual and class-wide allegations of wage discrimination. She contends that there is a "systematic and wide-spread disparity" in Defendant's salaries for male and female professors of all levels, including her own. (Pl.'s Resp. Opp. Def's. Mot. Summ. J. at 35) She does not specify whether this disparity is the result of intentional discrimination, or whether Vanderbilt's salary policies disparately impact women faculty. Plaintiff also argues that her own salary increases were dramatically reduced during the period that Venable served as Acting Dean. (Id. at 38) Presumably, then, Plaintiff argues that

any alleged disparity in her salary is the result of intentional discrimination by Dean Venable or the University itself.

Plaintiff contends that during the period of Dean Venable's deanship, from September 1, 1992 to July 31, 1994, Plaintiff's salary increases declined, from being the second highest cumulative salary increase in the Philosophy Department to being only the eighth highest. (Pl.'s Resp. Opp. Def.'s Mot. Summ. J. at 38.) Plaintiff provides no support for this contention. Defendant rebuts Plaintiff's assertion in two ways: first, Dean Venable notes that he was not involved in setting salaries for the 1992-93 academic year, but rather, outgoing Dean Vogeli set such salaries. Therefore, the 1993-94 year is the only one in question in Dean Venable's case.

Defendant argues that Plaintiff's contention must fail based on both the cumulative salary increases she received during her employment in the Department, as well as on a yearly basis during Dean Venable's tenure as Dean. Defendant submits data showing that, from the 1988-89 academic year through the 1993-94 year, Plaintiff received the third highest cumulative percentage raises in the Department. The two professors receiving higher cumulative increases were (1) Michael Hodges, who received a promotion to full Professor in the 1992-93 year and thus was awarded a supplemental salary increase); and (2) John Lachs, who holds the College's prestigious Centennial Professorship and was

awarded a higher salary as an inducement not to accept offers from other institutions. (Def.'s Reply Mem. at 11.) Moreover, if the cumulative increases are measured through the 1994-95 year (the year for which Dean Venable did have authority to set salaries), Plaintiff ranks second in the Department, behind only Professor Lachs. (Id.) Plaintiff has not presented any evidence that Professors Hodges and Lachs are similarly situated to her, and consequently, that their higher cumulative increases are discriminatory.

Furthermore, Defendant's evidence indicates that in the 1993-94 year -- the first year for which Dean Venable set faculty salaries -- Plaintiff received a 3.85% increase, the sixth highest in the Department (out of seventeen faculty members). This was higher than the increase she had received the previous year, 1992-93, under Dean Vogeli's leadership -- 3.66%, only the eighth highest increase. For the 1994-95 year, also set by Dean Venable, Plaintiff's increase was 4.08% the third highest raise in the Department, behind Professors Jeffrey Tlumak and Victoria Lynn McGeer. Again, Plaintiff has not offered any proof to show that Professors Tlumak, McGeer, or both were similarly situated to Plaintiff and undeserving of the higher increases. In light of the evidence offered by Defendant, and the failure by Plaintiff to rebut these findings, the Court cannot conclude that Plaintiff's own salary increases evidence discrimination. Consequently, summary judgement as to this portion of Plaintiff's wage discrimination claim is

appropriate.

As to her class-wide claims of salary bias, Plaintiff relies on statistical analysis of Vanderbilt's own salary data. Statistical evidence purporting to show pervasive discrimination "ha[s] served and will continue to serve an important role" in such cases, Kincade v. Firestone Tire & Rubber Co., 694 F. Supp. 368, 376 (M.D. Tenn. 1987) (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974); see also Coates v. Johnson & Johnson, 756 F. 2d 524, 539 (7th Cir. 1985) ("Statistical analysis appears to be a science and, when properly and fairly used, it can be of great assistance to the factfinder.") A common method for assessing statistics in discrimination cases is regression analysis, which isolates the impact of certain variables in effecting a certain outcome. By identifying all possible legitimate factors contributing to a certain disparate outcome, the statistician "can make predictions about what...job benefits similarly situated employees should ideally receive, and then can measure the difference between the predicted treatment and the actual treatment of those employees." Ottaviani v. State U. of New York at New Paltz, 875 F. 2d 365, 367 (2d Cir. 1989). In this way, a plaintiff may seek to prove that any "residual" disparity in the salaries of men and women could only be attributed to an illegitimate factor, such as gender. Id.

Social scientists, and in turn the courts, have adopted two standard deviations as a threshold measure of statistical significance. See Hazelwood School District v. United States, 433 U.S.299, 312 n.17 (1977); Castaneda v. Partida, 430 U.S. 482, 497 n.17 (1977); see also E.E.O.C. v. American National Bank, 652 F. 2d 1176, 1192 (4th Cir. 1981) ("courts should be extremely cautious in drawing conclusions [of law] from standard deviations of the range from one to three"). Two standard deviations translates, approximately, into a one in twenty, or five percent (.05), chance[24] that a particular disparity is due to chance, and to a particular factor such as sex. Consequently, statistical analysis revealing probability levels of .05 or smaller indicates larger numbers of standard deviations -- suggesting that the reasons for a disparity are questionable. Put another way, the higher the number of standard deviations, the lower the probability (measured as a percentage), that the disparity was random. The Court notes, however, that this threshold measure of statistical significance is not an absolute, either for plaintiffs or defendants. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 955 n.3 (1988) ("We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out

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[24] In reality, a .05 probability margin equals 1.96 standard deviations.

a prima facie case in the complex area of employment discrimination."); accord Ottaviani, 875 F.2d at 373 (and cases cited therein). Rather, statistical analysis' "evidentiary value' depends on the magnitude of the disparity it reflects, the relevance of a hypothesis of discrimination.'" Kincade, 694 F. Supp. at 377 (quoting E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 646-47 (4th Cir. 1983)).

In support of her allegations, Plaintiff submits the report of Paula England, Ph.D., a Professor of Sociology at the University of Arizona. Dr. England analyzed the data presented in a report issued in September 1994 by Vanderbilt's own Ad Hoc Committee to Study Gender Equity in Faculty Salaries in Vanderbilt University's College of Arts and Science.[25]

Dr. England performed a regression analysis to assess whether sex played a role in the salaries of professors of varying ranks -- Assistant Professor, Associate Professor (Plaintiff's rank), and full Professor -- both at the College and within the Humanities departments in particular, for the 1993-94 and 1994-95 academic years. Dr. England adjusted her figures according to the legitimate factors of rank, the

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[25] The Court notes that its analysis of this portion of Plaintiff's case is somewhat constrained by the fact that neither Plaintiff nor Defendant submitted a copy of Vanderbilt's report to the Court.

national average salary in one's discipline and rank, time since terminal degree, time at Vanderbilt, and time at current rank.

All told, Dr. England performed sixteen analyses. For the 1993-94 and 1994-95 academic years, at the Assistant Professor level[26] college-wide, she found women earning less than men by probability margins -- or "gender coefficients" -- of .16 and .14, respectively; within the Humanities, she found women earning less than man by a margin of .33 in 1993-94, but earning more than men by a margin of.89 in 1994-95. At the Associates Professor level[27] college-wide, Dr. England concluded that women earned less than men by probability margins of .30 and .28, for 1993-94 and 1994-95, respectively; among Humanities faculty, female Associate Professors made less than male colleagues by margins of .29 and .46, respectively. The disparities uncovered by Dr. England were greatest at the full Professor level: college-wide, women earned less than men by probability margins of .22 and .15 in 1993-94, respectively, and within the Humanities, women earned less

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[26] This was Plaintiff's category for the 1993-94 academic year prior to her tenure denial.

[27] This was Plaintiff's category for the 1994-95 year following her successful appeal of her tenure denial, and her consequent receipt of backpay.

than men by margins of .18 and .05 for each of the respective years.

As is made clear by the statistics above, women generally earned less than men both at the College and within the Humanities specifically for each of the two years measured. However, only at the full Professor level in the Humanities, for the 1994-95 year, did the disparity reach the "statistically significant" level of .05; for all other years and at all other faculty levels -- including Plaintiff's -- the probability margins were greater than .05, resulting in standard deviations too small to reach the "statistically significant" threshold.[28]

Dr. england also noted that controlling for years at current rank in performing a regression analysis in salaries may mask discrimination in salaries at the Associate and

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[28] Dr. England also calculated the average standard deviations when data for each rank is pooled for the two measured years. Consequently, the standard deviations for all Full Professors, all Associates Professors, and all Assistant Professors for both years are .10, .21, and .09 respectively. For those ranks within the Humanities faculty, the standard deviations are .03, .32, and .84 respectively. Thus, the only statistically significant disparity is again at the full Professor level within the Humanities.

full Professor level because women at Vanderbilt generally take longer than men to be promoted from Associate to Full Professors.[29] Dr. England performed a second study, and found that the "gender coefficients" for years spent at the Associate Professor level, before promotion, were .18 and .28 for all faculty in the 1993-94 and 1994-95 years, respectively, and within the Humanities, the gender coefficients were .22 and .31, respectively. Again, the Court notes that these disparities do not meet the statistically significant probability threshold of .05.

In response to Dr. England's report, Defendant filed the report of David W. Peterson, Ph.D, the President of PRI Associates, Inc., a consulting firm providing statistical analyses for employment discrimination cases. Dr. Peterson's paramount observation is that -- as indicated supra -- none of Dr. England's findings, save one, reach the statistically significant level identified by the Supreme Court as most probative of discrimination. Dr. Peterson goes on to also question Dr. England's other -- albeit statistically insignificant -- findings of gender disparity by questioning her methodology.

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[29] The Court notes that Plaintiff does not allege that the length of time before she herself was considered for tenure -- beyond the delays created through her tenure denial and the subsequent appeal -- was unduly long or biased in any way.

A principal threshold concern of Dr. Peterson's is that Dr. England's comparisons of male and female faculty member's salaries are based upon incomplete information; consequently, he contends that Dr. England's statistics fail to actually compare women faculty with "similarly situated" male faculty. Dr. Peterson notes that Dr. England has omitted from her analysis most of the measures of professional achievement -- such as research productivity, speaking engagements, participation in professional organizations and other service to the field, and success in obtaining grants -- which contribute to disparities in salary. Dr. Peterson also suggests that salary levels in the university faculty context are especially decentralized, and are highly dependant upon the subjective value placed upon the certain achievement measures -- indeed, much like tenure decisions themselves. Consequently, argues Dr. Peterson, Dr. England's more formulaic approach, such as lumping departments together to obtain average salaries and comparing salaries at Vanderbilt with salaries at other universities, ignores other legitimate reasons for deviations, yielding inflated "gender coefficients."[30] For more

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[30] Dr. Peterson notes that the University itself was aware of these deficiencies when it published its salary Report, and noted them. He quotes the Report: "[I]n the absence of independent measures of teaching effectiveness, scholarly research contributions, or service, rank might be included to provide a rough indication of these otherwise

accurate results, Dr. Peterson proposes a more individualized approach:

> At the first stage, one might identify people who are in the same department and rank, and display their salaries as scatter plots against their time in rank, their number of years at the University, and their number of years since achieving their highest degree. If female faculty are represented by symbols different from those used for males who have similar rank, experience and academic discipline. This picture...will show whether the female faculty are generally among the best of least well paid faculty with similar seniority within that rank and department, and they will also show whether there are individuals, male or female, who appear to be over or under paid. Someone intimately familiar with the relative qualifications of these individual faculty members then needs to pore over these charts to determine

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unmeasured academic contributions." (Peterson Report at 4 n.1.) The Report noted that it had not undertaken such an individualized analysis because "it is quite costly to do so, and standardizing across disciplines is difficult, if not impossible." (Id.)

> whether, in light of the qualifications not captured on the charts, the members' relative pay rates are appropriate.

(Peterson Report at 3.)[31]

Dr. Peterson also asserts that Dr. England's computational models are also deficient. In isolating the effect of gender on salary, Dr. England corrected for the legitimate factors of years since terminal degree, years of service at Vanderbilt, and years spent at current rank. Dr.

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[31] In support of his conclusion that Dr. England's failure to incorporate more individualized performance information indeed leads to an inflated coefficient, Dr. Peterson makes another observation: When one looks at various "measurable" qualities of male and female faculty, such as faculty chairs, numbers of male versus female faculty at different ranks, and length of time on the Vanderbilt faculty, men generally outstrip women -- 6.4% of male professors are department chairs, as opposed to 5.45% of women, for example, and male faculty have been at Vanderbilt an average of 15.6 years, as opposed to women's 6.3 years. Consequently, Dr. Peterson posits that in light of these overall disparities, it is likely that the unmeasured qualities of professional and teaching achievement discussed above would also reflect higher average levels of achievement by male faculty, which would in turn legitimize higher pay.

Peterson notes, however, that Dr. England assumes that the percentage increase for each of these years is the same "whether the year is the first, the twenty-fifth, or any other year." (Id. at 4.) Moreover, Dr. Peterson argues that the interaction of these three factors also affects the percentage increase -- for example, an Assistant Professor moving from her eighth to ninth year since terminal degree while moving from her third to fourth year at Vanderbilt might receive less of an increase than an Assistant Professor moving from her sixth to seventh year since terminal degree but moving from her fifth to sixth year at Vanderbilt, or vice versa.[32]

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[32] Dr. Peterson also challenges Dr. England's pooling of the two measured years to obtain "average" probability margins. He argues that such a method contravenes generally accepted principles for calculating statistics:

> Since the salary of a faculty member in one year is generally about the same as it is in the next, this mixing of the two files produces a jumble that is ill-suited to regression analysis, one of whose tenets is that each of the records in the file be independent of the others. Since this requirement is obviously not met by the mixed file, the connection between the fact situation and the regression model is severed, and there is nothing one can logically infer from the results.

Dr. Peterson also challenges Dr. England's use of "one-tailed" probabilities as the yield of her regression analysis. Dr. Peterson asserts that in employment discrimination cases, standard deviations are commonly expressed in terms of "two-tailed" probabilities.[33] Thus, Dr. Peterson claims that Dr. England's standard deviation results should be doubled before being analyzed. After such doubling, he notes, the .05 gender coefficient for full Professors in the Humanities -- the only statistically significant disparity uncovered by Dr. England's research -- becomes a 1.0 gender coefficient, thereby eliminating its statistical significance altogether.

Finally, Dr. Peterson challenges the methodology underpinning Dr. England's analysis of tenure delays for women professors at Vanderbilt. First, he again argues that her study is based upon insufficient information because it only uses membership in a certain department as the criterion for promotion decisions, rather than the myriad professional, as well as subjective, factors which go into the tenure decision. Second, Dr. Peterson contends that Dr. England's data treats equally those promotion decisions made recently with those made many years ago, failing to

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(Peterson Report at 7.)

[33] These terms will be discussed with greater specificity infra.

take account of the fact that "[i]t is possible, even probable, that the standards for promotion or the timetable for promotion has changed over the past twenty or twenty five years, at least in some departments." (Peterson Report at 8.) Indeed, Dr. Peterson notes that because Dr. England's data covers just two years, it does not reflect tenure decisions made in the past (even relatively recent ones) for those faculty who may have left Vanderbilt. Dr. Peterson also argues that Dr. England's results are skewed because faculty who are about to be tenured are not included in her figures. Finally, Dr. Peterson again raises the inaccuracy of stating results in terms of one-tailed probabilities, indicating that the disparities found by Dr. England would be even less pronounced if two-tailed probabilities are used.

Based on the analysis provided by Drs. England and Peterson, the Court concludes that summary judgment on Plaintiff's wage discrimination claim is appropriate. The most compelling reason for granting summary judgment is that Plaintiff's statistics themselves, irrespective of Dr. Peterson's contentions regarding their incompleteness,[34] do

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[34] The Court notes that its conclusion in this regard would be entirely different were Dr. England's calculations to yield standard deviations more suggestive of bias. While Dr. Peterson's critiques of Dr. England's studies are certainly persuasive, the Court believes that Defendant has not gone far enough to survive summary

not rise tho the level of statistical significance which would indicate widespread discrimination. See Hazelwood, 433 U.S. at 307-08 ("Where gross statistical disparities can be shown, they alone may in proper case constitute prima facie proof of a pattern or practice of discrimination.") (emphasis added). The Court is cognizant, and indeed has acknowledged supra, that the standard deviation model is not intended to be applied rigidly. However, in the absence

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judgment in only pointing out the potential shortcomings in Plaintiff's calculations. The Supreme Court has held that a defendant must go beyond such criticism and actually demonstrate that its method of statistical analysis would yield statistics undermining the disparity shown by the plaintiff. Bazemore v. Friday, 478 U.S. 385, 403 n.14 (1986); accord Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1416 (D.C. Cir. 1988) ("Mere conjecture or general assertions of inadequacies in the opponent's statistical case, without demonstrating their effect on the results, will not suffice."); Sobel v. Yeshiva Univ., 839 F.2d 18, 34 (2d Cir. 1988) ("We read Bazemore to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis."). Because Plaintiff's results so resoundingly fail to demonstrate statistical significance, however, summary judgment may be granted on those grounds.

of any other evidence of gender bias in salaries in this case -- whether through anecdotes, critiques of Defendant's mechanisms for setting salaries, or other means -- the Court has no choice but to rely solely on the statistics to find discrimination. See, e.g., Griffen v. Board of Regents, 795 F.2d 1281, 1293 (7th Cir. 1986) (in absence of any individual examples of disparate treatment in salary to "buttress a class claim," statistical evidence alone insufficient); cf. Coates, 756 F2d at 539 ("[S]tatistics are so manipulable that some skepticism may be justified when set in the evidentiary context of the whole case."); Kincade v. Firestone Tire & Rubber Co., 694 F. Supp. 368, 377 (M.D. Tenn. 1987) (value of statistical analysis as evidence of discrimination "depends on the magnitude of the disparity it reflects, the relevance of its supporting data, and other circumstances in the case supportive of or in rebuttal of a hypothesis of discrimination") (citation omitted).

Consequently, if the Court accepts the one-tailed probabilities presented by Plaintiff, it must conclude that only female full Professors in the Humanities are potentially affected by wage discrimination in a statistically significant way. Plaintiff's claim that she "can expect such discrimination in the future in the absence of injunctive relief" -- that is, if she ultimately wins promotion to full Professor from her current Associate Professor position -- is entirely unsupported and is simply too speculative a harm to preclude summary judgment in this case, at this time.

The College Rules do not provide much guidance on the question of how far in the future Plaintiff would be considered for such a promotion, but it is clear that a full Professorship is hardly a foregone conclusion: "Although there is no time limit for this promotion nor even a requirement to make it, departments are responsible for regularly determining which members are eligible for a full external review." (College Rules at IV, E.) (Emphasis added.)

Moreover, the Court is skeptical of denying summary judgment solely on the basis of Dr. England's calculations because it is skeptical that the one-tailed analysis is even appropriate in this case. While Plaintiff's provides a single statistical treatise citation in support of her endorsement of the one-tailed probabilities in the Title VII context; Defendant provides neither statistical nor legal support for the two-tailed approach. Nor has the Supreme Court has offered any guidance on the matter. However, the Court's research indicates that "one-tailed analysis tests whether a group is disfavored in hiring decisions while two-tailed analysis tests whether the group is preferred or disfavored." Hartman v. Duffey, 88 F.3d 1232, 1238 (D.C. Cir. 1996).[35] Put another way, one-tailed analysis is more

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[35] In light of the failure of either of the parties to enlighten the Court about the distinctions between one- and two-tailed tests, the Court relies heavily upon the excellent

appropriate "if not possibility of intentional discrimination favoring the protected group represented by plaintiff [e.g., women in this case] can be ruled out as defying logic, i.e., the available evidence excluding the statistic in question gives strong support to the conclusion that the system is either nondiscriminatory or disadvantageous to the plaintiff's group." D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 129-30 (1986 Cumulative Supp.) (quoted in Palmer v. Shultz, 815 F.2d 84, 95 (D.C. Cir. 1987)) (emphasis added). The end result, in terms of the two tests' statistical conclusions, is that the one-tailed test makes it easier to claim "statistically significant" evidence of discrimination: while a probability level of .05 under two-tailed analysis translates into 1.96 standard deviations, under one-tailed analysis the .05 statistically significant threshold becomes just 1.65 standard deviations.[36]

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explanation of these methodologies provided in Palmer v. Shultz, 815 F.2d 84, 92-97 (D.C. Cir. 1987).

[36] Indeed, at least one appeals court, after an examination of the statistical literature, as well as the transcript a statistical expert's testimony in the district court below, concluded that the use of the one-tailed test is most accurately seen as "data mining" designed to "beef up" statistics of discrimination, making it acceptable only in those Title VII cases where "independent evidence indicates

Given the fact that two-tailed analysis was the methodology approved by the Supreme Court in the seminal statistics-as-evidence-of-discrimination cases, Castaneda and Hazelwood, and given the absence of any argument on this point by the parties, the Court is inclined to reject Plaintiff's assertion that "[i]n discrimination cases, the issue is always whether one group is favored over another," and consequently, that a one-tailed test is appropriate because "the only question of interest is the likelihood of a difference in one direction, i.e., when only a positive disparity between the two numbers is being tested." (Pl.'s Resp. Opp. Def's. Mot. Summ. J. at 39) Rather, the Court follows the ultimate conclusion of the D.C. Circuit in Palmer v. Shultz:

> [A]lthough we by no means intend entirely to foreclose the use of one-tailed tests, we think that generally two-tailed tests are more

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the presence of discrimination of the type being challenged." E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 655, 656 (4th Cir. 1983). The Court notes, however, that Federal Reserve Bank received some criticism from two leading statisticians as being "unnecessarily strict." See D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 129 (1986 Cumulative Supp.) (footnote omitted) (quoted in Palmer, 815 F.2d at 95).

> appropriate in Title VII cases. After all, the hypothesis to be tested in any disparate treatment claim should generally be that the selection process treated men and women equally, not that the selection process treated women at least as well as or better than me. Two-tailed tests are used where the hypothesis to be rejected is that certain proportions are equal and not that one proportion is equal to or greater than the other proportion.

Palmer, 815 F.2d at 95-96 (citing W. CURTIS, STATISTICAL CONCEPTS FOR ATTORNEYS 119-22, 133-37 (1983)); accord Hartman, 88 F.3d at 1238.

Thus, the Court finds it is appropriate to double Dr. England's gender coefficients -- as suggested by Dr. Peterson -- to yield two-tailed probabilities. This calculation results in probabilities of discrimination between salaries of male and female faculty. A similar result obtains in relation to Dr. England's calculations of delays in tenure awards for women faculty, yielding probabilities ranging from .36 to .62, all well beyond the .05 guideline established by the courts.

C. State law claims

Given the Court's finding that Plaintiff's federal claims of sex and national origin discrimination are insufficient to withstand summary judgment, Plaintiff's only remaining claims are those brought under state law: her breach of contract and of covenant of good faith and fair dealing claims, and her Tennessee Human Rights Act discrimination claim. Because the Court no longer retains jurisdiction over these claims,[37] they are dismissed, although Plaintiff is free to refile them in state court.

V. Conclusion

In light of the foregoing findings, Defendant Vanderbilt University's Motion for Summary Judgment is granted, and Plaintiff's remaining state law claims are dismissed. An Order consistent with the findings contained herein is filed and contemporaneously.

Entered this the 20th day of January, 1998.

/s/ John T. Nixon
John T. Nixon, Chief Judge
U.S. District Court

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[37] Under 28 U.S.C. § 1367(c)(3), federal district court may decline to exercise supplemental jurisdiction over related state claims if "the district court has dismissed all claims over which it has original jurisdiction."

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IDIT DOBBS-WEIINSTEIN	)	
	)	
v.	)	No. 3:95-0560
	)	Judge Nixon
VANDERBILT UNIVERSITY	)	

ORDER

Pending before the Court in the above-styled matter is Defendant Vanderbilt University's Motion for Summary Judgment (Doc. No. 35), to which Plaintiff Idit Dobbs-Weinstein filed a Response (Doc. No. 43). For the reasons outlined in the contemporaneously filed Memorandum the Court GRANTS the Motion, and DISMISSES Plaintiff's remaining state law claims.

It is so ORDERED.

Entered this the 26th day of January, 1998.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

This document was entered on
the docket in compliance with
Rule 58 and/or Rule 79(a)
1-21-98 by ____.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
August 26, 1999
Leonard Green, Clerk

IDIT DOBBS-WEINSTEIN	)	
	)	
Plaintiff-Appellant	)	
Cross Appellee,	)	
v.	)	**Nos. 98-5266,**
	)	**98-5268**
	)	
VANDERBILT UNIVERSITY	)	
	)	
Defendant-Appellee	)	**O R D E R**
Cross Appellant.	)	

BEFORE: KENNEDY, SILER, and MOORE, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

LEONARD GREEN, Clerk

FACULTY MANUAL
VANDERBILT UNIVERSITY

Chapter 1

Principles and Rules of Appointment and Tenure

Sections A-D (omitted for brevity)

Section E

TENURE APPOINTMENTS AND PROMOTIONS

(Subsections 1-4 and 6 omitted for brevity)

(Policies covering appointments to non-tenured faculty positions are covered in Part 1, Chapter 3.)

For the award of tenure, Vanderbilt requires (1) excellence in research, scholarship, or creative expression in one's discipline and (2) a high level of effectiveness in teaching. From discipline to discipline, the form taken by a candidate's contribution will vary. But, in each case, Vanderbilt expects the level and quality of achievement in research, scholarship, or creative expression and teaching equivalent to that required for tenure in leading departments or schools of other major research universities. In addition, Vanderbilt expects satisfactory performance in the area of (3) service.

. . . .

5. Procedures for the Award of Tenure

Consideration of appointment to tenure involves (a) the tenured faculty of a department or school; (b) the dean of the school, acting in accordance with the standards and procedures of the school; (c) the appropriate University

Promotion and Tenure Review Committee; (d) the Provost of Vice-Chancellor for Health Affairs; (e) the Chancellor; and (f) the Board of Trust. Positive recommendations are ordinarily passed along to the next person or committee. Variations are described below.

The process of awarding tenure ordinarily begins with a positive recommendation by a majority of the tenured faculty members of a department or school. In the School of Medicine, the Executive Faculty acts in lieu of the tenured faculty members of a department in the tenure process. This recommendation is forwarded to the appropriate dean. However, in the event of a negative decision on tenure by the faculty of a department or school, the candidate may appeal (within ten days of receipt of written notification by the department chair) to the appropriate dean, who may (a) accept the negative faculty decision, thereby ending the matter, or (b) return it to the faculty for reconsideration. If the original negative decision is reaffirmed by the faculty, the dean, if he or she favors tenure, may send a positive recommendation to the appropriate University Promotion and Tenure Review Committee. If this group acts favorably, its recommendation is sent to the Provost or Vice-Chancellor for Health Affairs. A negative decision by the Promotion and Tenure Review Committee terminates consideration.

All recommendations are reviewed by one of the standing University Promotion and Tenure Review Committees. Both committees are appointed by the Chancellor, normally from nominations submitted by the

Consultative Committee of the Faculty Senate. As with all university level committees, the Chancellor has ultimate responsibility regarding the membership of the two Promotion and Tenure Review Committees.

The Promotion and Tenure Review Committee reports to the Provost. Its membership is made up as follows: one representative from each of the three divisions of the College of Arts and Science; one representative each from the School of Engineering, the Divinity School, Peabody College, Owen Graduate School of Management, and the School of Law; and the Dean for Graduate Studies and Research. The Provost designates a member of the committee to serve as chair.

The Medical Center Promotion and Tenure Review Committee reports to the Vice-Chancellor for Health Affairs. Its membership is made up of six representatives from the School of Medicine, three representatives from the School of Nursing, and the Dean for Graduate Studies and Research. The Vice-Chancellor for Health Affairs designates a member of the committee to service as chair.

Members of both University Promotion and Tenure Review Committees normally serve three-year staggered terms. The committees report all their decisions to the Provost or Vice-Chancellor for Health Affairs, and to the appropriate dean.

A recommendation for tenure forwarded to a dean by a departmental or school faculty moves forward only with the concurrence of the dean, except when a department or school appeals a dean's nonconcurrence. A decision to appeal

requires the affirmative vote of at least two-thirds of the department or school's tenured faculty, and is directed to the appropriate University Promotion and Tenure Review Committee.

When tenure is recommended by a dean, the University Promotion and Tenure Review Committee shall evaluate the recommendation on the basis of the recommendation's consistency with the statement of standards and procedures required by the school or college (see 4 above). Except in unusual cases, review will not consist of a second detailed evaluation of the candidate's qualifications. In unusual cases and in cases presented by appeal, the chair of the Promotion and Tenure Review Committee may appoint an ad hoc committee, composed of faculty in disciplines related to that of the candidate, to make another evaluation of the candidate's record.

In selecting members for an ad hoc committee, the chair of the Promotion and Tenure Review Committee will normally consult the members of the review committee, the Provost (or Vice-Chancellor for Health Affairs), and the appropriate dean and department chair. This additional evaluation may require the gathering of additional information regarding the candidate. If the ad hoc committee collects new and different information from that already compiled for the candidate, it should communicate such information to the appropriate dean and department so that they may have an opportunity to reconsider earlier decisions. The ad hoc

committee reports its findings to the appropriate University Promotion and Tenure Review Committee.

The award of tenure requires a positive recommendation from the appropriate University Promotion and Tenure Review Committee. However, except in the case of an appeal from a negative decision of a departmental or school faculty, a negative recommendation by the Promotion and Tenure Review Committee may be appealed by the dean to the Provost or Vice-Chancellor for Health Affairs, as appropriate. The final decision should be communicated in writing from the appropriate dean, the Provost, or the Vice-Chancellor for Health Affairs to the faculty members.

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Chapter 3
Appointment and Termination Procedures

Sections A-F and H (omitted for brevity)

Section G
GRIEVANCE PROCEDURES

A faculty member who feels that the University acting through any representative has breached an obligation owed to that faculty member may file a grievance with the Senate Committee on Professional Ethics and Academic Freedom. The University's obligations to its faculty, without being limited hereby, include adherence to: a) the University's appointment and tenure regulations; b) the other express and implied terms of the faculty member's contract, including

relevant portions of the *Faculty Manual*; c) commonly accepted norms of professional responsibility and academic freedom; d) stated or commonly understood standards of fair and reasonable procedure; and e) legal obligations with respect to nondiscriminatory treatment on the basis of race, sex or other prohibited factors.

The nonrenewal of non-tenured appointments shall not give rise to a grievance unless the nonrenewal involves (a) issues of professional ethics and academic freedom, (b) allegations of a failure by the University or those acting for it to follow stated or reasonable procedures, or (c) complaints of a civil rights nature, including complaints of race or sex discrimination.

A tenured faculty member may not be finally dismissed for cause prior to the disposition of any grievance arising from the dismissal.

Procedures for Referral to Senate Committee on Professional Ethics and Academic Freedom

Potential grievants are encouraged to consult informally with the Chair of the Senate Committee on Professional Ethics and Academic Freedom concerning common understandings about the University's obligations, standards of review applied by the Committee in prior grievance cases, and possible alternative approaches to the resolution of the dispute. Some disputes may be resolved satisfactorily at this stage by information mediation.

If a faculty member chooses to file a formal grievance, the grievance must be transmitted in writing to the Chair of

the Senate Committee on Professional Ethics and Academic Freedom within sixty days after the grievant becomes aware of the action forming the basis of the grievance. At the time a grievance is filed, the grievant must transmit a copy of the grievance and all supporting documents to the University representative whose actions form the basis of the complaint. Copies of any supplemental statements later filed by the grievant to further explain the complaint also must be transmitted by the grievant, at the time of filing, to the University representative whose actions form the basis of the complaint.

On receipt of a grievance, the Senate Committee on Professional Ethics and Academic Freedom will convene to determinate whether the grievance presents a good faith, non-spurious claim of breach of obligation by the University. In reaching its determination, the Committee may rely on the written request of the faculty member and the supporting documents, or may decide to hold a preliminary h earing to explore the matter further. The Committee, at this stage, will consider the statements or allegations of the faculty member in their most favorable light in order to determine whether the statements or allegations, if proven in a hearing, would establish a breach by the University of an obligation owed to the grievant.

The faculty member presenting a grievance shall have a written reply by the Committee within a reasonably prompt time, in which the plan of action of the Committee shall be outlined.

The Committee shall review the case to assure that the University's actions were procedurally and substantively sound. The University representative whose actions form the basis of the complaint will be asked to respond to the grievance in writing, briefly explaining his or her position on each major element of the complaint. In addition, the University representative will be asked to supply in a timely manner any supporting documents not previously filed by the grievant. Each party to the grievance will be asked to indicate whether he or she wishes to appear before the Committee to add to or explain the written record in the case. If such an appearance is requested, it will be scheduled at an appropriate point in the Committee's inquiry. In addition, the Committee may on its own initiative request that either party appear to answer questions and may request the presence of witnesses.

Attorneys may not appear with or on behalf of the grievant, witnesses, or the University in proceedings before the Senate Committee on Professional Ethics and Academic Freedom. It is assumed that either party may rely on legal counsel in the preparation of any documents or the collection of any evidence to be presented to the Committee.

If a grievant feels that any member of the Committee on Professional Ethics and Academic Freedom will not view the grievance with sufficient impartiality, the grievant may file with the Committee a written request that said member recuse himself or herself from the hearing and disposition of that grievance. In the event that a member of the Committee feels that his or her objectivity and impartiality with respect to a

particular grievance is subject to question, that member shall recuse himself or herself from the hearing and disposition of that grievance. If two or more members of the Committee recuse themselves with respect to a particular grievance, the Chair of the Faculty Senate shall appoint ad hoc members in their places with respect to that grievance.

Final Report of Committee to Be Submitted to the Chancellor

The Senate Committee on Professional Ethics and Academic Freedom shall submit a final report of its decision to the Chancellor. The report shall be in writing, and shall include findings of fact, conclusions, and recommendations. A copy of this report shall be made available to the grievant and to the University representative whose actions formed the basis of the complaint. If the Chancellor elects not to concur in the report, the Chancellor and Senate Committee on Professional Ethics and Academic Freedom shall meet in an effort to reach agreement.

In any case concerning the dismissal of a faculty member for cause or raising significant issues of conscience or academic freedom in which the Chancellor does not follow the decision or the recommendation of the Senate Committee on Professional Ethics and Academic Freedom, the Chancellor shall submit a full written report to the next meeting of the Executive Committee of the Board of Trust specifying the reasons for the action. In any other case in which the Chancellor disagrees with the recommendation of the Committee, the Chancellor will ask the General Counsel to

review the file and submit a written report to the next meeting of the Executive Committee of the Board of Trust stating the fact of that disagreement and the issue, or issues on which the Chancellor disagreed. Copies of the Chancellor's report (or the General Counsel's report) shall also be transmitted to the Chair of the Faculty Senate and to the Chair of the Senate Committee on Professional Ethics and Academic Freedom, as well as to the grievant.

Confidentiality and Other Matters

Except as disclosures are reasonably necessary in the investigation, hearing, and final disposition of a grievance, the grievant, members of hearing bodies, and other having knowledge of a grievance are expected to preserve the confidentiality of the grievance, provided that any individuals accused in a grievance of misconduct shall be informed of the grievance and given the opportunity to respond to the charges.

The fact that a grievance is pending may not be used as grounds for delaying considering of promotion or tenure beyond the time that such consideration is required by University rules.

A grievance may be withdrawn by the faculty member at any time prior to a decision of the Senate Committee on Professional Ethics and Academic Freedom. The withdrawal of a grievance shall not preclude the dean or the Chancellor from investigating the charges contained in the grievance or related matters.

It is understood that there are legal requirements relating to the time limitations when one may file a charge of

discrimination with federal or state human rights agencies. Should this deadline arrive prior to the completion of the grievance process, and should the grievant elect to file a charge with a governmental agency, this will not prejudice the grievance process.

VANDERBILT UNIVERSITY

INTER-OFFICE CORRESPONDENCE

Office of the Provost . Vanderbilt University

Date: September 22, 1994

To: Madeleine J. Goodman, Dean, College of Arts and Science

From: John H. Venable, Associate Provost

Subject: Request from Professor Idit Dobbs-Weinstein

At your requested, I have reviewed Professor Dobbs-Weinstein's appeal of your decision not to extend her appointment. I believe I can contribute to a response most effectively at this point by providing the facts related to the allegations in Professor Dobbs-Weinstein's memorandum of September 14, 1994.

(1) *"The special and unforeseen circumstances of the philosophy department were not responsible for former Acting Dean Venable's delay to June 21, 1994 in providing me with written notice that my appointment would*

expire at the end of the 1994-95 academic year."

These special and unforeseen circumstances did, in fact, determine the timing of the notification. Traditionally, notification of termination has been provided to faculty members who face a mandatory tenure decision only after all hope has ended for a favorable outcome of the tenure process. When a departmental recommendation for tenure is turned down by the Dean, the process continues until (a) the department files a successful appeal, (b) the department appeals but the appeal is denied, or (c) the department decides not to appeal. Only by following one of these three mutually exclusive paths is the process concluded.

On or slightly before June 21, 1994, I was informed by the Acting Chair that the tenured faculty of the Department of Philosophy had taken the unprecedented action of deciding formally not to consider an appeal until late summer. Until the department took this action, the possibility of concluding the tenure process before July 1 had been very real. Despite the fact that the process had not yet been concluded, it seemed to me (and counsel) that Professor Dobbs-Weinstein should be informed officially that the appointment she currently held (a

three-year, tenure-track assistant professorship) would end on June 30, 1995. She had, of course, been informed on June 14 that the departmental recommendation had not gone through. The delay between June 14 and June 21 was caused entirely by the department's delay in deciding whether to appeal, not to appeal, or not to reach a decision on an appeal. The delay between May 30 and June 7 was caused by the Chair's resignation and my consideration of it. The delay between June 7 and June 14 was required to find another Chair. Of course, this notification serves a formal role and provides no additional information to the faculty member beyond that contained in the letter of reappointment written three years earlier.

(2) *"Moreover, from May 26, 1994 to June 7, 1994 (the date on which Professor Sherburne's resignation was accepted) the department had a chairman."*

The department may technically have had a Chair — thought the point is debatable — but not one through whom business could be transacted. On May 25 Professor Sherburne informed me in writing that "as of today, I resign from the Chair and presume that you will function as the interim Director of the Program." He also stated that he was "unable to

continue being part of an administration which deals with my faculty in that way."

I took Professor Sherburne's position to be that from approximately 4:00 p.m. on May 25 he would not carry out the duties of the Chair. I was, however, somewhat perplexed by the resignation. It occurred a few hours after a meeting that had not involved me. I had to consider whether he should be asked to reconsider his position. Although there were many advantages in having him out, the Dobbs-Weinstein tenure case was a major reason to consider keeping him on.

On May 26 I had an emergency meeting with the Provost in the late afternoon. We agreed that I needed to know more before reaching a decision on Professor Sherburne. On May 27, I believe, I began trying to reach Professor Lachs — the proximate cause of the resignation. I eventually spoke to him at his Florida home and arranged to meet with him on June 2 when he returned. Between May 27 and June 2 I learned that on May 26 Professor Sherburne had written to the departmental faculty (including part-time and future members), described his disagreement with the administration, and announced his resignation. At that point there was no way he could continue as Chair. During this period I also learned

that he had left town. I held the meeting with Professor Lachs as scheduled. Professor Sherburne apparently arrived back in town on Monday, June 6. Through the departmental secretary I had already set an appointment with him for June 7, at which time I accepted his resignation. We did not discuss the Dobbs-Weinstein matter.

I immediately began to try to find a Chair. I met with Professor Tlumak early on June 8 and met again with him twice. On June 10 he declined to serve. Later that day I met with Professor Race. After two more meetings he agreed to become Acting Chair, effective June 14, 1994. I delivered the letter originally intended for Professor Sherburne to him. Later in the day, I believe, he informed Professor Dobbs-Weinstein of the decision.

(3) *"Former Acting Dean Venable was also aware of the fact that the philosophy department would disperse for the summer shortly after June 1, 1994. Consequently, the decision to withhold the May 26, 1994 memorandum was not the result of a special and unforeseen circumstance of the department, but rather a conscious decision of a managing agent of the University whose conduct in a matter within his duties is the*

responsibility and the authorized act of the University."

Of course, I had no idea how many faculty members would "disperse" or when they would do so. I did know that Professors Compton and Sherburne spend much of the summer at their summer homes. I now recall that toward the end of the June 1993 when the department was to consider a named professorship for Professor Charles Scott, both Professors Compton and Sherburne returned to Nashville to participate. Statement (3) is untrue.

(4) *"As you know, the numerical vote of the philosophy department's recommendation is not a matter of public record. For that reason there was no way for me to ascertain prior to the appeal meeting whether the two-third [sic] majority vote needed for an appeal was available until the department met on August 30, 1994."*

The hiatus between June 21, 1994, and August 30, 1994, was caused by the department's decision not to vote on an appeal. Professor Dobbs-Weinstein supported the delay by the department. I believe that Professor Race has a signed statement to that effect. Departments often conduct these votes

with proxies from absent members. The Department of Philosophy should have done so. If Professor Dobbs-Weinstein had wished, the department would have voted in June.

In fact, another candidate for tenure received notification of nonconcurrence on June 7 through the chair. The department appealed on June 13 with a number of votes cast by proxy.

Note that Professor Dobbs-Weinstein does not say that she did not know the department's vote, only that it is not a matter of public record. Of course, she knew it. It is not clear whether she knew that an original vote does not determine a vote on appeal. she probably does not know that candidates often lose votes on the appeal. This section is largely irrelevant.

It seems to me the important questions are whether Vanderbilt has deprived Professor Dobbs-Weinstein of something it owes her and whether, if it did, this deprivation affected her ability to appeal to the Faculty Senate or to seek other employment. The fact is, she supported and encouraged most of the delay herself. Nevertheless, she made contact with the Faculty Senate and may have filed a preliminary appeal. Even if she had submitted a full appeal in the summer, the Senate would have done nothing with it until the fall.

We should probably discuss some of these issues.

cc: John C. Callison

REPORT

Senate Committee on Professional Ethics and Academic Freedom

Grievance of Professor Idit Dobbs-Weinstein

April 13, 1995

The Senate Committee on Professional Ethics and Academic Freedom hereby submits to the Chancellor its report in the grievance of Idit Dobbs-Weinstein, Assistant Professor of Philosophy. By a vote of 6-2 the committee has concluded that the University has breached its obligation to follow "stated or commonly understood standards of fair and reasonable procedure" (*Faculty Manual*, p. 29), in the consideration of her candidacy for tenure. Accordingly, the committee recommends that the Chancellor send Professor Dobbs-Weinstein's tenure file, together with this report, to the Promotion and Tenure Review Committee for its consideration of the merits. A minority report is included as part of this document.

I. History of the Grievance

On January 28, 1994, the chair of the Department of Philosophy, Professor Donald Sherburne, sent to Acting Dean John Venable the department's recommendation that Professor Dobbs-Weinstein be promoted to associate professor with tenure. The department's recommendation came by a vote of 5-4, a matter that will be discussed later in this report. On April 27th, the dean asked for responses to ten questions relating to Dobbs-Weinstein's scholarship and teaching. Sherburne's reply two days later led to another inquiry from

the dean and another reply. Venable's letter declining to concur in the department's recommendation was dated May 26, 1994; but he states in his written response to the grievance of Dobbs-Weinstein that he could not deliver it to the chair because Sherburne had resigned on the previous day over a conflict relating to another matter. On June 14 he appointed Professor William H. Race of the Department of Classical Studies acting chair of the Department of Philosophy and gave him the May 26th letter so that he could communicate the decision to Dobbs-Weinstein.

Members of the department of philosophy met to consider an appeal of the dean's decision in late August (there are differing views as to whether they could have met earlier than this, closer to the communication of the decision in June). The appeal vote was again 5-4, lacking the required two-thirds majority necessary to send the file to the Promotion and Tenure Review Committee. Following this vote Professor Dobbs-Weinstein filed a grievance against the dean with the PEAF Committee on October 3rd (she had communicated with Professor Pinkston, chair of the 1993-94 committee, in the previous summer about such a possibility). The committee accepted the grievance shortly thereafter and invited Mr. Venable to submit a response, which came to the committee on December 19th.

The committee has been considering the grievance in weekly extended meetings since the beginning of the spring semester. It has heard testimony from Dobbs-Weinstein and Venable (in the latter case, in two sessions), as well as from

Professor Sherburne in his capacity as the former department chair. Dobbs-Weinstein submitted a summary statement of her grievance which included some response to Venable's initial reply, and Venable submitted a reply to this document as well. The committee made no requests for additional documents relating to the tenure file.

II. The Grievance

In the two statements submitted to the committee as well as in her oral testimony, Dobbs-Weinstein has claimed that the university's obligations to faculty members have been violated in this case at several points, as follows:

1. with respect to tenure and other regulations, in that
   a) the dean granted an interview with a known opponent of her tenure after receiving the department's recommendation;
   b) two newly appointed and tenured department members were excluded from the department's decision in the appeal vote;
   c) materials were added to her file after the department's recommendation.
2. with respect tot norms of professional responsibility, academic freedom, and ethics, as well as of stated or commonly understood standards of fair and reasonable procedure, in that

a) the dean attacked, without justification, the manner in which her manuscript had been accepted for publication;

b) he misinterpreted the letters of recommendation contained in the file.

3. with respect to obligations of nondiscriminatory treatment on the basis of sex and ethnicity/nationality, in that

a) the dean used a method of evaluation of her undergraduate teaching that was distorted on the basis of sex and ethnicity;

b) the decision constitutes a continuation of discrimination against women;

c) the university has already begun to replace her with a tenured male in her field (in the appointment of Professor Lenn Goodman to the department in May, 1994);

d) one member of the department who opposed her tenure had become antagonistic because of her lack of interest in pursuing a relationship with him.

Two additional items, separable from the above list, were also included, one as an issue relating to contract and the other as a factor in interpretation of the file. First, Dobbs-Weinstein points to the *Faculty Manual*'s statement that "written notices of renewal or non-renewal normally will be made by June 1 of the year preceding their final year;" yet she did not receive

notice until June 14, 1994 (this issue was addressed by the committee in a separate memo of March 16, 1995, which is included here as an appendix). Second, she contends that the dean ignored the history of ideological division in the department of philosophy and thus put excessive weight on the four dissenting votes in the department's tenure and appeals judgments.

III. The Dean's Response

Former acting dean Venable submitted two documents to the committee responding to several items in the grievance, together with his letter to the department chair dated May 26, 1994, in which he gave his decision regarding the tenure recommendations, and the document entitled "Rules and Procedures for Appointments, Renewals, Promotions, and Tenure in the College of Arts and Science." He also met with the committee on two consecutive weekly sessions to discuss these materials.

The letter to the department chair addressed three items. First, the dean took up the department's 5-4 vote to recommend tenure, which, he wrote, "raised serious doubts about tenure." These doubts are raised by the pattern of departmental support over the previous eighteen years, which ordinarily recommend strong candidates by an overwhelming vote; in fact, no candidate had been recommended to the provost with less than 60% vote of the department, only two with less than 67%, and only one person with more than three negative votes.

Second, the dean took up the standard regarding research. He characterized the letters from outside reviewers as "moderately favorable," but raising a number of concerns. Letters from department members addressed to the dean "raise further doubts about excellence in research." Next, the dean discussed the acceptance of the book manuscript by SUNY Press. He noted that it had not yet been published and reviewed, al though letters from reviewers were available; he stated that the book was accepted after the department vote on tenure, which itself raised questions about the promise of future scholarly activity; and he believed that "the relationship of the press to members of the faculty, and the free exchange of information between the press and the department prior to the decision to accept the book raises doubts about the objectivity of the processes of the press and the influences which led it to accept the manuscript." Reviewing the list of published papers and conference presentations in the c.v., Venable stated that "some of the papers apparently did not undergo peer review. Although these contributions carry some weight, the file reflects concerns about many of the papers." In sum, he declared, "the file does not make a persuasive case that the candidate has achieved excellence in research."

In the third place, the dean considered the standard for teaching. He accepted that she was "an effective teacher at the graduate level," but he characterized her record as an undergraduate teacher as mediocre. In addition, her classes had small enrollments and "she was not exposed fully to the

range of teaching that is normally experienced and expected." For faculty members in the College of Arts and Science, he stated, "to earn tenure, faculty members must teach undergraduates well." He noted previous departmental concern over her undergraduate teaching evaluations; while acknowledging that her ratings in her freshman seminar had improved, he did not find that changing his overall evaluation that she had not met the standard of being a highly effective teacher.

We report in detail from this letter because it plays a rather large role in the grievance and the responses that followed. Although the decision was communicated orally to Dobbs-Weinstein in June by Professor Race, later followed by written notification, the statement of categories considered in the decision was only given in September by the then chair, Professor Compton, who summarized the dean's letter in two pages (while this letter was apparently approved by Dean Goodman, it focused by its editing on certain points and thus could have given them more weight than they were intended to have by Venable's initial letter). This, then, was what Dobbs-Weinstein had to use in the preparation of her grievance. In conversation with the committee about the matter, Venable stated that he would not have written the Compton letter.

Venable's responses to specific points in the grievance are extensive and detailed. He identifies the items within the grievance very similarly to the list above, and he discusses the history of the appointment and the review process itself before

coming to the specific items of the grievance itself. He admits meeting with a department member and receiving letters from department members, noting that this has been a long-standing practice in the College of Arts and Science. He extends this justification by responding to the judgment of PEAF in the tenure case of 1993-94, acknowledging there to be risks as well as rewards but contending that "the risk is worth the potential gain." Regarding the exclusion of the two new faculty members from the August department meeting to consider an appeal. Venable notes that he was no longer dean at the time; he also observes that if they had been permitted to vote, even the best result would have been a 7-4 decision, again insufficient to send the file to the PTRC. On the question of his concerns about the acceptance of the manuscript, he claims he was only pursuing appropriate questions in his review of the file. With respect to the evaluation of teaching, the dean refers to the literature on bias in student ratings by way of suggesting that "there is no credible basis for believing that there is a significant gender bias." Concerning the appointment of Professor Lenn Goodman (in connection with the appointment of Madeleine Goodman as dean of the College of Arts and Science), Venable notes his assurances to the department that Goodman's position would be an "add-on," not affecting the promotion of tenure-track faculty or the future hiring of faculty in accordance with the department's plan for recruiting new faculty, much of which had already been approved by the provost.

IV. Assessment of the Grievance

In our deliberations, the entire committee agreed that several of the specific charges lacked merit:

1. Although the appointment of Professor Goodman overlapped with the time in which the tenure decision occurred, we accept Mr. Venable's assurances that there was no connection between the two decisions and recognize that the University's practice of offering positions to spouses of appointed persons occasionally results in additional persons within departments.

2. We accept the appropriateness of Professor Race's decision not to permit the two new senior members of the department to participate in the appeals meeting and vote. Dean Venable pointed out that one of them did not have tenure at the time and thus could not have participated for that reason. Neither had been in the department during the previous year and thus had not taken part in the initial meeting to consider and vote on the tenure question itself; whatever their views of the question, we believe it was certainly fair for them not to participate in the later deliberations.

3. We are unable to pursue the allegations regarding another member of the department and his opposition to Dobbs-Weinstein's tenure based on her rejection of a social relationship with him. Although we would take it seriously were additional materials provided (which certainly could have taken the form of an independent charge related to the event), we did not receive any, and Professor Dobbs-Weinstein did not elaborate on it in her testimony before us.

The committee has several areas of concern:

1. *The evaluation of research.* The committee believes that the University's obligation to a faculty member being considered for tenure includes a fair evaluation of the material presented as scholarly research and reasons supporting any finding that the material does not meet the university's standard of excellence. In this case the committee believes that the dean's narrative cites numerous "concerns" but does not state reasons for his decision that the candidate's scholarship did not meet the standard of excellence, and thus invites the allegation that the process lacked both fairness and objectivity.

The letter from Dean Venable to Professor Sherburne of May 26, 1994 outlines the considerations involved in his decision, although not all of these are presented as reasons for denial of tenure, creating an ambiguity for the committee as to which, if any, of these reasons were decisive. This ambiguity was compounded in the letter from Acting Chair Compton to Dobbs-Weinstein of September 20, 1994 (such a letter being in accord with the College's recognition that candidates may ask for "a written statement describing his or her strengths and weaknesses after the final decision is reached").

A brief reconstruction is necessary to illustrate the problem that was created. In April, 1994 Venable posed questions to Sherburne regarding the manuscript accepted by SUNY Press for publication,, having to do with the timing of acceptance and with the impartiality of the readers of the Press. In the May 26th document, Venable states that

Sherburne's "discussion (in response to my inquiry) of the acceptance process, the relationship of the press to members of the faculty, and the free exchange of information between the press and the department prior to the decision to accept the book *raises doubts about the objectivity of the processes of the press and the influences which led it to accept the manuscript*" (italics ours). In his testimony before the committee Venable characterized this inquiry as a normal part of his decanal activity, but denied that the manner in which the manuscript was accepted played a significant role in the denial of tenure. However, the statements were eventually conveyed to Dobbs-Weinstein in the Compton letter as one of the reasons for denial of tenure:

> The Dean expressed the view that, since the book is not yet published, we do not have published scholarly criticism on it. He was concerned that the book was not accepted for publication at the time the Department voted on tenure. Moreover, he thought that the process by which the book was accepted and the relationship of the press to members of the faculty raised doubt about the basis of the acceptance of the manuscript.

This information was presented to Dobbs-Weinstein as one of the major negative factors in the "mixed" evidence regarding her scholarship, and she points to this in her grievance as part of her claim that Venable's "conclusion was a product of discrimination rather than reasoned." While we do not believe

that the conclusion was "a product of discrimination," the committee is troubled at how simple "considerations" have acquired the status of "reasons" to support a conclusion regarding the merits of her scholarship, when there is so little substantial discussion of the quality of her work.

A related point could be constructed regarding Venable's comment in the May 26th document regarding other scholarly contributions. He notes that the c.v. "includes a number of published papers and conference presentations. Some of the papers apparently did not undergo peer review. Although these contributions carry some weight, *the file reflects concerns about many of the papers*" (italics ours). Compton's letter on the same point states: "With respect to the published papers and conference presentations, the Dean noted that some apparently did not undergo peer review and that the file reflects concerns about a number of them." But in the testimony before the committee, Professor Sherburne went through this list and suggested that more than half of the

items had been refereed.[1] Venable did not elaborate on the statement that "the file reflects concerns ... ."

Regarding the evaluations submitted by outside reviewers, the dean characterizes the letters as follows: four are positive, two are positive with reservations, one is "on the whole negative" but recommends tenure, and one is clearly negative. On this last individual's judgment Venable notes that there are indications from both the reviewer and Professor Sherburne that matters extraneous to scholarship may have affected his view. Venable concludes that "the letters taken together are moderately favorable," and he qualifies this judgment by reference to the institutions of the reviewers, "few of which – according to your response to my inquiry – may have a philosophy program among the top twenty." In light of the fact, pointed out to the committee by Sherburne, that many top philosophy departments do not have a specialist in Dobbs-Weinstein's area, this latter point may be irrelevant

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[1] Professor John Lachs offered another perspective in a letter to the committee, stating that focusing on the lack of peer review in journal articles in this case failed to take account of "what normally happens to scholars well-situated in a quickly developing area of the humanities. In this respect, Jewish studies within Medieval thought is similar to my own field of American philosophy. In both, edited books are coming out in sufficient numbers to take up nearly all the production of promising young thinkers. This does not mean that their published work is not refereed. On the contrary, the editors of such volumes are usually famous senior scholars who do a careful job of quality control."

and, further, should perhaps be perceived to be the department's fault rather than the candidate's. Taken as a whole, seven of eight reviewers recommend tenure, and the eighth might potentially be disqualified on other grounds. The committee is concerned that in this discussion of evaluation of scholarship, none of it seems to take up the question of the excellence of the scholarship itself.

The question of the acceptance of the book manuscript was discussed earlier. Related to this matter, the dean states in his response to the grievance that he was concerned most about the length of time that it took the candidate to complete her manuscript and about the absence of full evaluations in the academy; in the letter to Sherburne he states, "We are left with the confidential views of referees, anonymous reviewers, and members of the department, not with opinions that have withstood the light of published scholarly criticism." When asked in his meeting with the committee how much time in advance of tenure review would be appropriate for a candidate for tenure to present a manuscript so as to permit such evaluation, he said that he did not know; most of the committee thought two years a minimal length of time from submission to acceptance to publication to reviews – is a failure to submit a manuscript over two years prior to a tenure decision a reason for deciding that the standard of excellence is not met? Again, no substantive criticism was voiced.

The committee is worried that in the consideration of whether the candidate had achieved excellence in research, "concerns" and "considerations" have been appropriately

elevated to reasons for deciding that the standard is not met in this case. When asked about each matter individually before the committee, Venable consistently emphasized that none of these "concerns" was a primary factor in his conclusion – that his decision was a "balancing" of factors. The committee is left, however, without reasons to support the dean's judgment that the candidate's scholarship falls short of excellence, due to the many disavowals. Thus, the committee believes that further review of the candidate's scholarship on its merits is warranted.

2. 2. *The evaluation of teaching.* The dean concluded that Dobbs-Weinstein was not a highly effective teacher of undergraduate students and thus determined that she did not meet the standard established for this category. In drawing this conclusion he referred primarily to student ratings and comments. In addition, in his letter to Sherburne, Venable discusses in some detail the pattern of small undergraduate enrollments in her classes, stating that "she escaped undergraduate teaching to an extent that would seem impossible, particularly so in the period during which she had been advised to demonstrate improvement in undergraduate teaching ... . The evaluations of her teaching must be read in this context."

But the committee learned in testimony from Professor Sherburne that the context is even more complex. He stated that from the initial appointment the department believed it

needed strength in medieval philosophy (Dobbs-Weinstein's specialty) for its importance to the graduate program; such a specialist would have to have some undergraduate contact, but would need to focus primarily on graduate teaching. According to Professor Sherburne, at the graduate level Dobbs-Weinstein's teaching was extraordinary; for a junior faculty member her number of dissertation committee assignments was extremely high (second or third highest in the department), her mentoring relationships with students were frequently noted and highly valued, and her evaluation numbers from graduate courses were consistently near the 5.0 level.

In Sherburne's view, the number of undergraduate students taught by Dobbs-Weinstein was consistent with the expectations of the department and with her own expectations when she was hired. Further, he characterized her undergraduate evaluations as a reverse bell curve – some students love her, though others greatly dislike her as a teacher. The former often say that they were lost for some weeks, but that the material eventually came together for them in a stimulating way. The result is a numerical mean that Sherburne described as on the low side of average for the department; his question was, however, how much should graduate teaching count in the overall evaluation. In her grievance Dobbs-Weinstein points to the statement in the *Faculty Manual* that a high level of effectiveness is to be demonstrated "in any of the numerous forms that teaching takes and in any of the settings in which it occurs" as support

for her claim that she has met the standard. In the dean's account, not meeting the standard with respect to undergraduate teaching means that she has not met the standard.

The committee is concerned about resting a tenure decision so heavily on the basis of undergraduate teaching evaluations, especially in the small numbers present here. If, as we have been told, the evaluations are bi-modal in character, then the critical decision regarding whether the standard has been met is determined by a relatively small number of undergraduate students – at most, roughly half of the small pool of undergraduate students she has taught. While we have not received evidence of prejudice in the evaluations, we have been aware of the multiple possibilities for prejudice that could occur in the evaluations, just because of the person in question and the character of her subject matter: Dobbs-Weinstein is Jewish, female, foreign, active in issues regarding sexual orientation, and she challenges students' views of religious truth and reality in the context of her courses on medieval philosophy. She has been the target of ethnicity/religion-based attacks in the form of vandalism and graffiti while at Vanderbilt. Dean Venable professed ignorance of some of these factors, and this raises doubts about whether these factors were properly weighted in the assessment of the teaching. In the view of the committee, these circumstances make it incumbent on the dean to consider other sources of teaching evaluation to ensure that the University is not indirectly applying inappropriate criteria

for effective teaching. Moreover, Dobbs-Weinstein's status in her own department appears to have been, by mutual understanding, different from most assistant professors in the College of Arts and Science in that she was intentionally directed toward an unusually large graduate teaching responsibility. Under these circumstances the committee believes it is arbitrary to discount so severely the quality of her graduate teaching in reaching an overall determination about tenure. Because of these questions the committee believes that a further review of the teaching credentials is warranted. We do not question of overall policy regarding the importance of undergraduate teaching at Vanderbilt, but only the apparent failure to consider this candidate's entire record in this particular case.

3. 3. *The characterization of the departmental vote.* In his original response to the grievance Venable did not discuss his view of the initial departmental vote. But in his letter to Sherburne he begins with this item and states that "the recommendation from the department in this case by the thinnest of margins (5-4) raises serious doubts about tenure;" he goes on to cite statistics of cases over the past eighteen years, one being that ninety-eight candidates had been recommended by their departments with an aggregate total of thirty-four negative votes. This detail was communicated to Dobbs-Weinstein in

Compton's letter to her; it becomes, then, a ground for the charge that the dean did not properly characterize this vote because he did not take into consideration the deep division currently represented in the department and the possibility that, consequently, the split vote may not be an accurate reflection of her merit. In his second written statement and in conversation with the committee, Venable made less of this factor, saying only that when he saw the divided vote he knew it would be a difficult case. Professor Sherburne also discussed this question with us, reporting, for example, that the department had not yet been able to agree even on a candidate to interview for the position of department chair in the search that is currently under way. It appears from this and other examples that the department is seriously divided, in part on ideological lines, and that some of these divisions may have manifested themselves in the vote on Dobbs-Weinstein's tenure (despite the dean's recounting of past votes in the department, many of which occurred before the present configuration of persons). Whatever the case, it is not clear from the materials whether this was important in the dean's decision (some suggest that it was,

some that it was not); the committee is concerned that the dean may have unfairly weighted the fact of a close vote or that the division itself made a meaningful vote on appeal impossible, and that this underlines the need for further review.

4. *Comment regarding the ex parte letters.* This grievance does not include specific allegations regarding the content of *ex parte* letters submitted by department members to the dean following the department's vote. Still, they are mentioned – no doubt because PEAF expressed concern about the practice in a grievance considered last year – and they are discussed in detail in Venable's response to the grievance. Part of the question depends on an interpretation of what the College Rules permit, part on the appropriateness of various departments' practices in the solicitation of views from its members in tenure and promotion cases. In last year's grievance, faced with the allegation and testimony which suggested the likelihood that prejudicial views were expressed in such letters, PEAF suggested that the consideration of such letters was inappropriate; and in her review of that case following the acceptance of the report by the Chancellor, Dean Goodman did not consider the contents of these letters. Regarding the accusation in the Dobbs-Weinstein grievance concerning his meeting with a member of the philosophy department, Dean Venable shows how careful he was to avoid the appearance of impropriety by suggesting to this person that he would not consider any matters he might raise in

conversation; he then invited the person to submit a letter, which he also did with other members of the department. In the end six of the nine voting members of the department submitted letters. As he reviews both the history of this practice and the possible judgment regarding it, he acknowledges that "the letters do present certain risks as well as potential benefits" and concludes that "the risk is worth the potential gain."

The question that is raised again in this case, though less forcefully than in the previous one, is whether the consideration of *ex parte* letters taints the decision-making process. Some members of the committee wonder if in our current climate, where suspicions of prejudice relating to race, gender, age, and other factors are frequent, the practice of inviting and accepting such letters is a risk that is truly worth the potential gain. Including faculty letters in a tenure file that is available to other faculty members in the review process is more likely to encourage the articulation of views on the merits of a case and enable evaluation and response within the faculty itself.

V. Recommendation

The recommendation of PEAF is that Professor Dobbs-Weinstein's tenure file, together with this report, be sent to the Promotion and Tenure Review Committee for its considerations of the merits. We believe this to be the best option for review of the candidate's qualifications in a fair and objective manner.

THE MINORITY REPORT

Acting Dean Venable's letter to Professor Sherburne and Professor Compton's letter to the grievant led to some confusion, namely, whether the close department vote, and the manner in which the grievant's manuscript was accepted for publication, were significant factors in his decision to deny tenure. However, we are not convinced that this confusion is relevant to the issue of the fairness of the process.

The Dean's evaluation of the research and teaching of Professor Dobbs-Weinstein appears to have been conducted according to established policy of the College of Arts and Science. He expressed misgivings about her scholarly productivity and indicated that her outside letters were good but not good enough. There is no evidence that he applied inappropriate criteria in evaluating her research. Her teaching seems to have been evaluated in the same manner as that of other candidates for tenure. One can perhaps question the Dean's insistence that a high level of effectiveness in undergraduate teaching is required for tenure, given that the grievant's forte appears to be graduate student teaching and providing research orientation for such students. The *Faculty Manual* leaves room for opposed interpretations of the range of teaching (graduate vs. undergraduate) in which the candidate is expected to show a high level of effectiveness. However, as long as the focus on undergraduate teaching is applied consistently, we believe that the Dean has the prerogative to apply it in his evaluation of teaching. No evidence was presented to suggest that the student's low

scores in the undergraduate teaching evaluations were vitiated by student attitudes toward her religion, sex, foreign origin or personal lifestyle. This does not mean that such factors did not play a role in the students' evaluations; but we believe it impossible to establish that this was the case.

Whether the divisions within the department influenced the vote on the grievant's tenure is certainly not relevant in the case of the first vote; it was positive. Including ex parte letters in a tenure file may not be good. However there are no written policies within the University that prohibit a Dean from doing so. We view the College Rules and Procedures as documents authored and adopted by the faculty. They regulate departmental procedures in tenure cases; they do not bind the Dean. Considering such letters is a long standing practice in the College of Arts and Science.

APPENDICES

1. 1. Memo from PEAF to Chancellor Wyatt, March 16, 1995,
regarding implications from the date of notification of Professor Dobbs-Weinstein regarding the dean's decision.
2. Grievance filed by Professor Dobbs-Weinstein, October 3, 1994.
3. Response to the grievance from former Acting Dean Venable, December 19, 1994.

March 16, 1995

To: Chancellor Joe B. Wyatt
From: Dale A. Johnson, Chair, PEAF Committee
Subject: Report of one item related to the grievance of Professor Idit Dobbs-Weinstein

Professor Idit Dobbs-Weinstein submitted a grievance to the Professional Ethics and Academic Freedom committee on October 3, 1994, relating to the decision of Acting Dean John Venable to reject the department of philosophy's recommendation for her tenure. The dean's letter declaring his decision was sent on June 14, 1994 to the then acting chair, Professor William Race; the department determined that it would not meet to consider an appeal until the beginning of the school year at the end of August. When the department vote to appeal the dean's decision to the Promotion and Tenure Review Committee did not reach the required two-thirds majority, Professor Dobbs-Weinstein submitted her grievance to PEAF.

Our committee has spent many hours in review of the grievance and the responses to it by Mr. Venable, and our judgment will be coming to you soon. But there is one item that can be considered separately, namely, the question of the timing of the decision and the potential damage resulting thereto to Professor Dobbs-Weinstein. Because she made it a part of her grievance, PEAF has had to consider it carefully. She notes the statement in the Faculty Manual that "written

notices of renewal or non-renewal normally will be made by June 1 of the year preceding their final year" (Chap. 1, sec. D). She contends that the delay past June 1 meant that the department could not meet to consider an appeal until the beginning of the new school year, and that this in turn delayed her submitting a grievance until October (and further delayed in the committee's consideration of the grievance until January, we might add, because Venable's reply was not completed until December 19th).

Venable's response (of December 19 and a second of February 21, 1995) make the following points regarding this issue: that he had made his decision not to support the recommendation for tenure on May 23rd, that though completing his written statement to this effect by May 26th he could not send it to the department chair because the chair had resigned the day before, and that when he had appointed Professor Race acting chair on June 14th he could then give him the May 26 memorandum so that Race could inform Dobb-Weinstein of the decision. He also contends that the department could have met in June (even with some members voting by proxy, if necessary) to consider an appeal if it had wanted to do so.

In weighing the respective claims, the committee has had to determine what is the university's obligation toward a faculty member and whether, by the delay in reporting the dean's decision, the grievant was damaged and deserves some remedy. Consideration of the stated date of June 1 and the modifier "normally" recognizes that the date is a target and

that it has not for some years represented the end of the school year, after which time faculty may be inaccessible. At the same time, since the department's recommendation for tenure had been submitted on January 28, 1994 and the dean's first inquiry to the chair regarding these materials did not come until a full three months later, the responsibility for delay should rest largely with the dean and not with whether there was or was not a department chair late in May to whom a decision could be communicated. Suppose a decision to support the department's recommendation instead of to deny it had been made at that time; would there have been time for the PTRC to review the decision and a recommendation forwarded to the Board of Trust?

The PEAF committee has voted 6-2 to support this part of the Dobbs-Weinstein grievance: that the university's obligation to report such a decision by June 1 was breached and that the ensuing delay has damaged Dobbs-Weinstein by extending well into the next academic year the consideration of the grievance itself and our determination of its merits. The majority in this vote believe that the appropriate remedy would be an extension of one year in her appointment as a faculty member. The minority believe that the delay of two weeks beyond June 1, which unfortunate, probably did not result in damage to the grievant and that some of the delay beyond initial notification is the responsibility of the philosophy department. We understand that the grievant's independent petition to Dean Madeleine Goodman regarding

such an extension has been denied, bu the majority believe that fairness on this matter warrants reconsideration.

Dale A. Johnson, Chair

Barbara Adair

Julia A. Breyer

Rebecca Brown

Deborah German

Andrea Maneschi

Christopher Maurer

W. T. Pinkston

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.
NOV 19 1996
BY _____
Deputy Clerk

IDIT DOBBS-WEINSTEIN,	)
	)
Plaintiff,	) JURY DEMAND
	) Civil Action No. 3:95-0560
vs.	) HON. JOHN T. NIXON
	)HON. JULIET E. GRIFFIN
VANDERBILT UNIVERSITY,	)
	)
Defendant.	)

AFFIDAVIT OF JOHN LACHS, Ph.D.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

John Lachs, Ph.D., being first duly sworn on oath, states as follows:

1. I am currently Centennial Professor of

Philosophy employed by Vanderbilt University and have been employed in the Philosophy Department at Vanderbilt University since 1967.

2. I have personal knowledge of the facts set forth in this affidavit.

3. I have known Dr. Dobbs-Weinstein since about the time she became employed by Vanderbilt University in the Philosophy Department in 1987.

4. I saw and spoke to Dr. Dobbs-Weinstein frequently during the period of time that she was reviewed by Vanderbilt University for tenure.

5. From the time Acting Dean Venable communicated his decision not to concur in the Department's recommendation of a grant of tenure to Dr. Dobbs-Weinstein until Dr. Dobbs-Weinstein received tenure in November, 1995, I observed that Dr. Dobbs-Weinstein lost weight, became somewhat more distant and lost some of her interest in philosophical discussion and scholarly research. In addition, during that period of time, Dr. Dobbs-Weinstein expressed to me her feelings of frustration, anguish and distress that gender and/or national original discrimination played a role in the University's decision making process.

6. During the period of time between June, 1994 and November, 1995, Dr. Dobbs-Weinstein consulted with me concerning my knowledge of any departments with potential job openings for a person in her specialty and as a result of our discussions, I was aware that she was under pressure and

stress in attempting to locate another job in the event her grievance or lawsuit did not result in a grant of tenure.

7. I personally observed the interaction between Dr. Dobbs-Weinstein and members of the Philosophy Department opposed to granting her tenure. During the period of time from mid-June, 1994 to November, 1995, I observed the difficult and tenuous working relationship between Dr. Dobbs-Weinstein and those other members of the Department and the stress that Dr. Dobbs-Weinstein was under as a result of the negative decision of the Acting Dean concerning tenure. I observed that in these circumstances and relationships, Dr. Dobbs-Weinstein did not have the same sense of humor or easy-going friendliness which she had exhibited prior to being advised of Acting Dean Venable's failure to concur in the Department's recommendation to grant tenure to Dr. Dobbs-Weinstein.

8. Based upon my knowledge and experience and upon communication with Departments of Philosophy at other colleges and universities, the initial negative tenure decision concerning Dr. Dobbs-Weinstein has injured and will continue to injure the professional reputation of Dr. Dobbs-Weinstein and will continue to adversely impact upon her professional career as a philosopher and as a scholar.

Further affiant saith not.

/s/ John Lachs
JOHN LACHS

Sworn to and subscribed before me on this 18th day of November, 1996.

/s/ Judy S. Bennett
NOTARY PUBLIC

My commission expires 7-25-98

JUDY S. BENNETT
NOTARY-AT-LARGE
COMMISSION EXPIRES
7-25-98

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN
NOV 20 1996
BY _____
Deputy Clerk

IDIT DOBBS-WEINSTEIN,	)
	)
Plaintiff,	) **JURY DEMAND**
	) **Civil Action No. 3:95-0560**
vs.	) **HON. JOHN T. NIXON**
	)**HON. JULIET E. GRIFFIN**
VANDERBILT UNIVERSITY,	)
	)
Defendant.	)

AFFIDAVIT OF JOHN J. STUHR, Ph.D.

STATE OF PENNSYLVANIA
COUNTY OF CENTRE

John J. Stuhr, Ph.D., being first duly sworn on oath, states as follows:

1. I am currently Chairman of the Department of Philosophy employed by Penn State University and have been Chairman of the Philosophy Department at Penn State

University for approximately three years. I received my Ph.D. in Philosophy at Vanderbilt University. I have served as Director of the Humanities Center at the University of Oregon and Head of the Department and Head of the Division of Humanities and Arts at Whitman College. I have had substantial experience recruiting both junior and senior level faculty and potential faculty in the field of philosophy and across the humanities.

2. I have personal knowledge of the facts set forth in this affidavit.

3. I have known Dr. Dobbs-Weinstein professionally from sometime after she became employed by Vanderbilt University in its Philosophy Department.

4. In or about 1994, I learned that Dr. Dobbs-Weinstein had not been promoted or granted tenure by Vanderbilt University although I also later learned that Dr. Dobbs-Weinstein was sometime later granted tenure and a promotion by Vanderbilt University.

5. University faculty members who encounter problems in receiving promotion and tenure that are relevantly similar to those encountered by Dr. Dobbs-Weinstein typically face, as a direct result of these problems, negative consequences in their professional lives due to limited prospects for employment at other institutions. This means it is likely that the problems Dr. Dobbs-Weinstein encountered will impact negatively her future professional prospects for employment at institutions other than Vanderbilt. More specifically, it is reasonable to believe that the problems that

Dr. Dobbs-Weinstein encountered in receiving promotion and tenure at Vanderbilt are likely to raise questions at academic institutions that will result in her being a less attractive candidate for employment than she would be if the tenure and promotion problems at Vanderbilt had not been encountered.

6. On the same basis, I believe that it is reasonable to expect that the problems encountered by Dr. Dobbs-Weinstein in obtaining her promotion and tenure at Vanderbilt will have a negative impact on her professional reputation in the field of philosophy.

Further affiant saith not.

/s/ John J. Stuhr
John J. Stuhr, Ph.D.

Sworn to and subscribed before me on this 20th day of November, 1996.

/s/ Cynthia B. Vincenti
NOTARY PUBLIC

My commission expires _____

NOTARIAL SEAL
CYNTHIA B. VINCENTI, Notary Public
Centre County
My Commission Expires Sept. 8, 1998

Supreme Court, U.S.
FILED
FEB 17 2000
CLERK

No. 99-1113

IN THE

Supreme Court of the United States

IDIT DOBBS-WEINSTEIN,

Petitioner,

v.

VANDERBILT UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the plaintiff suffered an adverse employment action sufficient to establish a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1, *et seq.*, when she was initially denied tenure to associate professor with tenure though later promoted by the University and made whole as a result of the University's internal grievance procedure.

2. Whether the decision by the Court of Appeals for the Sixth Circuit that the defendant's denial of tenure to the plaintiff constituted an "interim decision" conflicts with this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2269, 141 L. Ed. 2d 633 (1998)?

3. Whether the decision of the Court of Appeals for the Sixth Circuit that the defendant's denial of tenure to the plaintiff in May 1994 did not constitute an "adverse employment action" conflicts with decisions by First, Third, Seventh, Ninth, Eleventh and D.C. Circuits?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

The Respondent, Vanderbilt University, is a private, non-profit corporation chartered under the laws of the State of Tennessee. It has no parents or subsidiaries.

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42 U.S.C. §§ 2000e-1, *et seq.* . . . . . i, 2

Tennessee Human Rights Act, T.C.A. § 4-21-401 . 2

Vanderbilt University ("Vanderbilt" or the "University"), the employer of the petitioner, Idit Dobbs-Weinstein, requests this Court to deny the Petition for Certiorari. Under the specific facts of this case, the decision by the Sixth Circuit does not conflict with *Delaware State College v. Ricks* or *Burlington Industries, Inc. v. Ellerth* or the decisions by any other circuit court of appeals. The Sixth Circuit's decision that the University's initial denial of tenure does not constitute an adverse employment action, since she ultimately received tenure through Vanderbilt's internal processes and was made whole for any monetary losses, was correct based on the facts of this case and existing case law.

STATEMENT OF THE CASE

The Respondent essentially accepts the Petitioner's Statement of the Case, including the factual basis surrounding her claim. The Respondent disagrees with the statement contained in Petitioner's Statement of the Case that its Chancellor accepted the recommendation of the University's Professional Ethics and Academic Freedom ("PEAF") Committee "only" after this action was filed, although it is factually correct that the Chancellor acted after the Plaintiff had filed her complaint in the District Court. (Petition at p. 6).

As a result of the grievance filed by the Petitioner under the provisions of the University's *Faculty Manual*, Dobbs-Weinstein received promotion to associate professor with tenure and was made whole for any financial loss which she sustained as a result of the initial denial of tenure. Petitioner received her pay through August 31, 1995 and received all back pay, including an upward adjustment in her salary in November, 1995.

Through the grievance filed by Dobbs-Weinstein with the PEAF Committee, that Committee recommended that her promotion file be forwarded to the Promotions and Tenure Review Committee ("PTRC"). The effect of that recommendation, which was adopted by the University's Chancellor, was the same as an appeal by the Petitioner to the PTRC. The PTRC's ultimate recommendation that Dobbs-Weinstein be promoted to associate professor was accepted by the Chancellor and Board of Trust.

REASONS FOR DENYING THE WRIT

I.

UNDER THE SPECIFIC FACTS OF THIS CASE, THE DECISION BY THE SIXTH CIRCUIT DOES NOT CONFLICT WITH *DELAWARE STATE COLLEGE OR BURLINGTON INDUSTRIES*, OR THE DECISIONS OF ANY OTHER CIRCUIT COURT OF APPEALS.

In its decision affirming the District Court's grant of summary judgment to the respondent, Vanderbilt, dismissing the Plaintiff's claims of national origin and gender discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1, *et seq.*, and the Tennessee Human Rights Act, T.C.A. § 4-21-401, ("THRA"), the Sixth Circuit found that the Plaintiff had failed to establish that she suffered an "adverse employment action" which would give rise to a claim under Title VII or the THRA. The Court noted that since its review of the District Court's grant of summary judgment was *de novo*, it could affirm that judgment "on any ground supported by the record, even if they are different from those relied upon by the District Court." 185 F.3d at 545, n.2. After reviewing

the tenure process in effect at Vanderbilt at the time of the Plaintiff's review and appeal, the court concluded that the Dean's decision not to concur in the recommendation for promotion by Petitioner's department did not constitute an adverse employment action sufficient to establish a prima facie case of discrimination. Noting that Dobbs-Weinstein succeeded in Vanderbilt's internal grievance process, and that the University's final decision was to grant her tenure, the court concluded that she had not ". . . suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII." 185 F.3d at 546. The court reasoned that to hold otherwise would be "to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed." (*Id.*).

In its Motion for Summary Judgment before the District Court, the University argued that Dobbs-Weinstein's claim should be dismissed since it was "moot" in light of the University's award of tenure to her in November, 1995. Although the District Court rejected that argument, it found on the merits that the University was entitled to summary judgment since there was no evidence in the record to support Plaintiff's claim that she was denied tenure because of her gender or national origin.[1]

Although the University did not specifically argue that Dobbs-Weinstein had not suffered an adverse employment action, it did argue that her claim was moot since she had

1. Petitioner's reference to Dean Venable's "discriminatory decision" (Petition at p. 26) is contrary to the District Court's finding that she failed to make out a case of sex or national origin discrimination based on his decision not to concur in the Philosophy Department's recommendation that she be promoted.

received the award of tenure which she sought and had been made whole for any salary loss because of the delay in the tenure decision while her grievance worked its way through the University's process. The Petitioner argued that since she had not received interest on the back pay which she was ultimately awarded by the University, she was not in fact "made whole." Since the total interest to which the Plaintiff would have been entitled was approximately $150.00, the University argued that the amount was *de minimis* and certainly would not have justified the court's time in hearing the Plaintiff's claim on its merits, even if the District Court had not dismissed her discrimination claim.

Other courts have reached similar results on substantially similar facts. *See Howze v. Virginia Polytechnic and State Univ.*, 901 F. Supp. 1091, 1096-97 (W.D. Va. 1995); *Negussey v. Syracuse Univ.*, 1997 WL 141679 at *8-*12 (N.D.N.Y. March 24, 1997); *Davis v. City Univ. of New York*, 1996 WL 243256 at *8-*9 (S.D.N.Y. May 9, 1996).

Although there are similarities between the tenure review procedures in various universities, few of those procedures are identical. Although the grievance procedure which Plaintiff followed through the PEAF Committee was not part of Vanderbilt's tenure review process, it was a recognized forum for members of the faculty to contest adverse decisions in the tenure process. Through the review of the decision affecting the Plaintiff's status conducted by that Committee, and the subsequent acceptance of the Committee's recommendation by the University's Chancellor to have her file reviewed by the PTRC, which is part of the tenure review process, the Petitioner received the remedy which she sought — promotion to associate professor with tenure.

Petitioner's contention that the Sixth Circuit's decision is contrary to *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) is misplaced. In *Ricks*, the Court held that the plaintiff's cause of action under Title VII arose when he was advised by the university in that case that he would not receive tenure, even though he was given a one-year "terminal" contract of employment at that time. Although the decision adverse to Ricks was subject to review under Delaware State's internal grievance procedure, the Court held that his cause of action arose when he was "officially" advised that he would not receive tenure and would be terminated at the conclusion of the one year terminal contract. Had the decision on Ricks' promotion been reversed by Delaware State through its own internal grievance procedure, he, like Dobbs-Weinstein, might well have suffered no "adverse employment action" although his cause of action arose at the time of his initial notification of his failure to be promoted.

Here, the Respondent does not dispute the fact that Dobbs-Weinstein's cause of action under Title VII, or the THRA, "arose" when she was advised of the negative decision on her promotion. What the Respondent contends, and what the Sixth Circuit held, however, is that since the negative decision affecting the Plaintiff was ultimately reversed by the University through its own process, there was no "adverse" action giving rise to such a claim and that claim was properly dismissed.

Similarly, this Court's decision in *Ellerth* is of no help to the Petitioner. In *Ellerth*, the court defined those actions which would be considered "tangible" employment actions

giving rise to vicarious liability of employers for the improper actions of their agents in the sexual harassment context. *Ellerth* did not address the situation like that in the present case where an agent, even one acting improperly under Title VII, or some other statute prohibiting discriminatory conduct, made an adverse decision regarding an employee, but the employer, through its own review of that process corrected the "adverse" action. Here, the Petitioner continued to receive her regular salary and teach her courses for the year following the initial denial of her motion. Although her pay ended on August 31, 1995, and she did not begin teaching classes at the commencement of the fall, 1995, semester, she was reinstated to her position with all rights and privileges of an associate professor with tenure and made whole for any monetary loss which she had suffered between August 31 and November, 1995, including an upward adjustment of her salary to the level where it would have been had she been promoted in 1994 at the time of her initial tenure review. Clearly, she suffered no "tangible" employment action or "adverse" action for which any remedy exists under Title VII.

II.

THE PETITION SHOULD BE NOT GRANTED BECAUSE THE HOLDING IN THIS CASE IS UNIQUE TO ITS FACTS AND THE PROCEDURE IN EFFECT AT ONE UNIVERSITY.

Even if this Court should find some conflict between the Sixth Circuit's holding and the holding by other circuits in tenure cases, the writ should be denied in this case since the Sixth Circuit's decision is unique to the specific facts before the Court.

Both tenure processes and internal grievance procedures vary greatly among colleges and universities. The Sixth Circuit's holding that under the procedures in effect at Vanderbilt in 1994 and 1995, there was no adverse employment action against the Petitioner does not necessarily constitute precedential value for other cases arising under different tenure procedures at other universities. Since the Vanderbilt procedure and the recommendation of its PEAF Committee effectively resulted in an appeal of the dean's adverse decision and a subsequent review of that decision by its PTRC, the "adverse" action was effectively no more than an interim decision. The effect of a denial of tenure at a different university under different procedures, such as those at Delaware State, might well result in a different outcome. Accordingly, there is no need for this court to review the Sixth Circuit's decision in this case.

CONCLUSION

Dr. Dobbs-Weinstein's Petition for Certiorari should be denied.

Respectfully submitted,

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